

THE JAMMU & KASHMIR LAW REPORTS.

Shri Anant

SAMVAT 2002

BAISAKH

(APRIL-MAY, 1945)

[PAGES 1-18]

CONTAINING

**CASES DETERMINED BY THE HIGH COURT
OF JUDICATURE, JAMMU & KASHMIR,
AND BY HIS HIGHNESS' BOARD OF
JUDICIAL ADVISERS.**

CITATION:—I, J. & K. L. R. 56.



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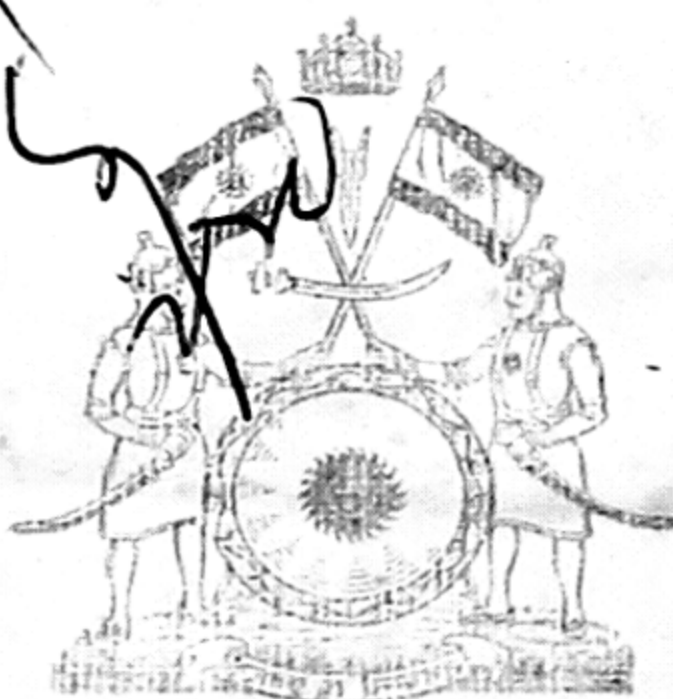
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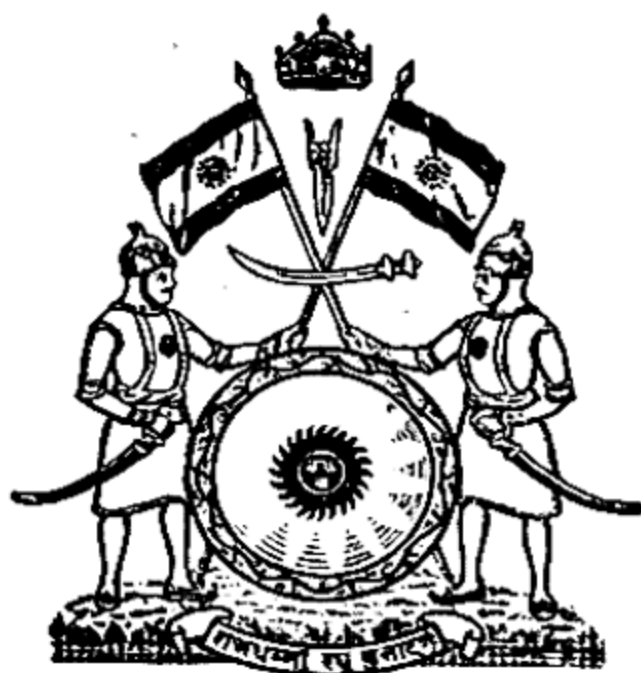
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explained. If the decision only in one way puts an end to the litigation, the order is not final. Unless the proceeding in which the order is passed is of such a nature that the order in either way finally disposes of the matter in litigation, an order in such proceeding is not a final order. The order is not final unless it finally disposes of the rights of the parties in relation to the suit.

47 I. A. 124—A. I. R. 1920 P. C. 86; 60 I. A.

76—A. I. R. 1933 P. C. 58; (1891) I. Q. B. 34; referred to.

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CIVIL PROCEDURE CODE, 1977—

Order XXIX, rule 1—Subscription and verification of pleading in suits by or against a Company—Principal Officer of the Company.—Whether Assistant Official Liquidator is such Officer. The law contemplates one or more “liquidators.” A person described as Assistant Official Liquidator is in law a liquidator and as such entitled to sign and verify complaints on behalf of the Company in liquidation. The Company being in liquidation, the directors and officials of the Company are not functioning, and it is only the official liquidator who can be considered to be the principal official within the meaning of order XXIX rule 1.

(2) Civil Procedure Code (Act X of 1977)—Section 13—Right of a foreigner to sue in State Courts—Where a foreign judgment is not conclusive, a suit in the suit to enforce original liability is maintainable.

A Company registered in British India is entitled to sue in the State Courts which cannot refuse to recognise its status as determined by the law in force in British India. The fact that the Company is in liquidation does not in any way affect the defendant's liability. The order of a High Court in British India directing the contributories to pay what is due from them cannot be enforced in the State as it could be enforced in British India but the liquidator can bring a regulated suit in the State to enforce the original liability incurred by the defendant when he purchased the shares.

RAM RAKHA MAL CHOPRA v. PEOPLES BANK OF INDIA—IV,
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CONSOLIDATION OF HOLDINGS ACT 1996—

Section 22—Jurisdiction of Civil Court barred as regards matters arising under the Act—Section not applicable if wrongful trespass on the land is committed subsequent to consolidation and suit for ejectment is instituted.

When the consolidation of holdings has already been effected and possession is given to parties and any wrongful trespass on the land is committed thereafter, a suit for ejectment lies in a Civil Court and section 22 is not applicable. In such a case the plaintiff is not seeking to obtain a decision or order relating to consolidation of holdings which the Governor or any other officer referred to in the section is specially empowered by the Act to determine, decide or dispose of.

MULK RAJ AND OTHERS *v.* CHUHRA—IV, J. & K. L. R. ...

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RIGHT OF PRIOR PURCHASE ACT, 1993—

Plea of waiver—Probabilities evenly balanced—Direct oral evidence—View of the trial judge not to be lightly disregarded. The fact that no notice of the sale was given to the pre-emptor under section 18 of the Right of Prior Purchase Act, the possibility that the sale consideration was to a certain extent inflated and the fact that there is some indefiniteness in the oral evidence as to the time of offer and as to the terms which were offered to the pre-emptor when he refused the offer, lead to an inference against the consent. On the other hand the fact that the appellant was present at the time when the extract from *jamabandi* was taken from the *patwari* and made no protest and he was also present at the time of mutation proceedings and he attested the mutation order without any protest coupled with the fact that he has brought the suit on the last day of limitation lead to an inference that at one time he had no objection to the sale or at least he did not care to assert his right. In a case in which the probabilities are so evenly balanced the direct oral evidence must of necessity turn the scale. And in a matter of appreciation of oral evidence the view of the trial judge before whom the witnesses were examined and who had an opportunity to observe their demeaner, cannot be lightly disregarded.

In such a case it is not sufficient for the pre-emptor appellant to show that there can be two opinions on the question of waiver but he has to show that the judgment in appeal is beyond doubt wrong and that the finding of the trial Judge on the plea of waiver, which is based upon an appreciation of oral evidence and which has been affirmed by the High Court on a review of entire evidence is manifest.

HASHAM ALI *v.* MOH'D. ALAM—IV, J. & K. L. R. ...

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APPEALS TO HIS HIGHNESS' ACT, 1996—

Section 10—Appeal in Criminal cases—Certificate to be granted if case is arguable—Not necessary that a question of law is involved in the case.

Section 10 of the Appeals to His Highness Act which gives a right of appeal to a prisoner sentenced to death or imprisonment for life does not lay down expressly or by implication that in granting a certificate the High Court should find that a question of law is involved. A certificate should be granted if the case is arguable, it may be as on a question of fact or law. In some cases the question of an appropriate sentence may be an arguable one and it is desirable that even in such cases certificate should not be withheld.

Faiz Alam v. State—2 J. & K. L. R. 149 referred to and quoted.

STAR DAR v. STATE—IV, J. & K. L. R.

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CIVIL PROCEDURE CODE, 1977—

Sections 100 and 101—Second Appeal—Concurrent findings of first two Courts on a question of fact—Conclusive in second appeal.

The concurrent findings of the first two courts on a question of fact is conclusive in second appeal to the High Court who has no power to interfere with it.

ISMAIL PAREY AND OTHERS APPELLANTS v. RAHTI—IV, J. & K. L. R.

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PLAINT—

Claim set out in plaint not made out—No finding without proper pleadings and without proper investigation.

When a plaintiff cannot make out the claim set out in the plaint, the suit must fail.

It will not be proper to arrive at a finding without proper pleadings and without proper investigation.

MAHANT BHOLA GIR v. AMAR GIR—IV, J. & K. L. R. . .

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DHARMARTH COUNCIL—

Its status and powers.

The Dharmarth Council is an administrative Council of charities which has been given the status of a "registered company under the Companies Act No. XI of 1977" by order No. 1 of His Highness and in it the supervision and management

of certain charities including "Sarkari temples" is vested by the said order read with "Ain Dharmarth."

MEMBERS OF THE DHARMARTH COUNCIL *v.* KANSHI DASS
AND OTHERS—IV, J. & K. L. R.

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MOHAMMADEN LAW—

Co-heirs debt—Decree against one only—If binds the non-party heir —Execution of such decree—Right of non-party heir to his share of the property sold in execution.

A decree obtained against some only of the heirs for the debt due from deceased is not binding on the others so that in spite of a sale in execution of such decree the latter can recover their share of the property sold in execution of the decree.

I. L. R. 7 All. 822, I. L. R. 7 All. 716, I. L. R. 23 All. 263, I. L. R. 58 All. 594, ('31) A. O. 253, (1935) 10 Luck., 443 I. L. R. 43 Bomb. 412, I. L. R. 43 B. 575. I. L. R. 40 Mad. 243 referred to.

REHMAN JOO AND OTHERS *v.* *Mst.* SHALA—IV, J. & K.
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LIMITATION ACT (IX OF 1995)—

Section 14—Exclusion of time spent in another proceeding with the diligence and good faith—Suit instituted under Order XXXVII C. P. C. for summary disposal—Subsequently plaint returned on request of counsel with permission to file it before a Court of competent jurisdiction after making the due amendment—Whether plaint returned under Order VII, rule 10 or Order XXIII, rule 1, C. P. C.—Application of section 14 Limitation Act.

BHAGAT SUKHDIAL DUNICHAND *v.* PUNJAB KASHMIR BANK,
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1. DHARAMARTH COUNCIL—Whether competent to appoint a Mahant in case of a vacancy in Dasnami Akhara (Maisuma) Srinagar.

The Board have not been referred to any provision in Regulation I of 1991 or any other law or command of His Highness in support of the contention that the Dharamarth is competent to appoint a Mahant in case of vacancy in Dasnami Akhara.

Succession to the office of the Mahant of an institution like Dasnami Akhara is ordinarily regulated by usage and unless it is established that by some law in force in the State or by usage the Council of Dharmarth has power to appoint a Mahant for Dasnami Akhara in certain circumstances it cannot be claimed that by virtue merely of its position the Council of Dharamarth is competent to appoint a Mahant in a given contingency.

2. HINDU LAW—RELIGIOUS ENDOWMENT—Person managing affairs of institution and treated as Mahant by all persons—Property entered in his name in revenue records—Such person is entitled to recover for benefit of institution property which belonged to institution but has not been held by trespassers.

Where a person has been managing the affairs of the institution and has been treated as its Mahant by all the persons interested therein and the property entered in the revenue records in the name of the previous Mahant was, on his death, mutated to him and there is no body who disputes his title to the office of the Mahant, such a person is entitled to recover, for the benefit of the *math*, the property which belonged to the *math* and is wrongfully held by the trespasser. A. I. R. 1935 P. C. 44 quoted and followed.

3. HINDU LAW—RELIGIOUS ENDOWMENT—Debt—Mahant—power to incur for the benefit of the institution or in a case of need.

A Shebiat or a Mahant can borrow money and even alienate the debutter property in a case of need or for the benefit of the estate.

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REGISTRATION ACT (XXXV OF 1977)—Section 77—Suit for compulsory registration of document in case of order of refusal by Registrar—Scope of enquiry in such a suit—Enquiry in regard to the passing of consideration or in regard to the proof which the plaintiff had offered before the Sub-Registrar about the non-appearance of the executants is foreign to the scope of the suit.

The scope of enquiry in a suit under section 77 of the Registration Act is limited and well settled. The plaintiff in such a suit has to establish a valid presentation of the document for registration within the time prescribed as also the refusal by the Sub-Registrar and also by the Registrar, under section 72 or 76 of the Registration Act, to register the document on an appeal or application by the plaintiff within the prescribed time. But if these conditions are fulfilled and the execution of the document is admitted any enquiry in regard to the passing of the consideration of the document, or an enquiry in regard to the proof which the plaintiff had offered before the Sub-Registrar about the non-appearance of the executants are foreign to the scope of the suit and any irregularity in these matters or any mistake in regard to these matters in the order of the Sub-Registrar do not make his order or subsequent proceedings on its basis as nullity.

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PRESS AND PUBLICATIONS ACT, (I of 1989)—

- (1) Section 10 (1) (d), (e) and (f) Ranbir Penal Code (Act X of 1989)—Sections 124-A and 153-A—Gravamen of charges both under the Press and Publications Act, 1989 and the Ranbir Penal Code, 1989 is the same i. e. endeavour to promote public disorder and disturb public tranquility.

The provisions of clauses (d), (e) and (f) of sub-section (1) of section 10 of the Press and Publications Act are almost word for word the same as those laid down in sections 124-A and section 153-A of the Ranbir Penal Code. The gravamen of the charges under which security is required to be deposited from the printer or publisher of a newspaper under the Press and Publications Act is the same as that under section 124-A and section 153-A of the Penal Code. Though the two sections of the Penal Code have been put in two different classes, the real gist of the offence of sedition as well as that of exciting class hatred is the same, namely its tendency to disturb public tranquility. The intent of the legislature must be gathered from the plain words of the sections and in their accepted meaning in judicial pronouncement. 11 Cox. Cr. Cases 59, A. I. R. 1942 Fed. Court 22, I. L. R. 36 Cal. 44, I. L. R. 22 Bom. 149, I. L. R 39 Mad. 1085.

- (2) Section 10 (1) (d) & (e)—Attack in the article directed against some persons in the Government—Will it amount to attack on the Government or on those persons—This depends upon the context of article and its effect on the mind of the average man. When the attack is directed against some persons in the Government who in the opinion of the writer are not loyally serving the Government and who, by their action or inaction are throwing the Government into disrepute and sowing the seeds of mischief, is it to be necessarily taken to be attack on the Government or may it not rather be read as an attack on the persons above mentioned so as to induce them to mend their ways and thus leave no room for disaffection on the part of the general body of citizens? This would turn on the context and on a careful consideration of the question as to what would be the real effect of the article taken as a whole and on natural interpretation of the words employed on the mind of the average man. 8 B. L. R. 421, 3 I. L. R. 39 Mad. 1156 and A. I. R. 1919 P. C. 36 referred to.

- (3) Section 10 (1)—what other factors to be considered in judging an article besides the article itself.

While the freedom of press is a valued privilege of the citizen, there are other factors that must also be considered in coming to a conclusion as to where to draw the line between freedom and licence. The state of society, the time and circumstances, the amount of latitude in the matter of criticism that may be permissible, having regard to the kind or class of persons who may read the articles,—all these should enter into the determination of the question as to whether the right to freedom of expression vested in the citizen has been rightly and judicially exercised or whether it has transgressed the limit.

- (4) Sections 10 (1)—Article to be read as a whole—Mere abusive epithets, declamations, invectives, turbid language not necessarily condemnable—Real intention and spirit of the article to be looked into.

An article should be dealt with in a fair and liberal spirit not picking out an objectionable sentence here or a strong word there or giving an undue importance to inflated or turbid language but looking at the real intention and spirit of the article (11 Cox Cr. Ca 59, 14 Cal. 36). It is also to be remembered that mere abusive epithets, declamations, invectives, turbid language will not necessarily bring the writing under condemnation. What really counts is whether on a perusal of the articles as a whole one can come to the conclusion that they have the tendency to create a feeling of hatred or contempt or disaffection against the Government, established by law, in the mind of the ordinary average man who reads the newspaper.

- (5) Section 10 (1) (f) Meaning of the word "classes" explained.

When the persons that comprise a particular group are not clearly ascertainable, or when the group mark is shifting and changeable, it is scarcely possible that any criticism of such changeful or changeable group can lead to breach of tranquility.

Expression such as "Editors' Conference", "journalists' conference", "reactionary political leaders", "Hindu Capitalists", "National Conference", "Yuvak Sabha leaders" in the article in question represent such mixed and indeterminate bodies that it is difficult to imagine that they constitute "classes" within the meaning of section 10. A. I. R. 1933 Bom. 65 and A. I. R. 1940 Bom. 379 referred to.

RIGHT OF PRIOR PURCHASE ACT (II of 1993)—

Section 14—Acquisition by vendee during pending of suit not effective.

An acquisition by a vendee during the pending of a suit under the Right of Prior Purchase Act cannot affect the rights of the plaintiff which arose before the institution of the suit.

KH. AMMA KALLA *versus* AMIR-UD-DIN AND OTHERS, IV J. &
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 APPEAL TO H. H. ACT (XV OF 1996)—Section 5—Value of subject matter—Duty of the High Court.

If a petition alleges before the High Court that the value of the subject matter of the original suit and of the proposed appeal is more than Rs. 2,500, the High Court is bound to take notice of such allegation under section 5 of the Appeals to His Highness' Act, 1996.

KRIPA *versus* R. B. TH. KARTAR SINGH AND OTHERS, IV, J. & K. L. R.

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CUSTOM—Full particulars to be given in pleadings—Proof—Best proof are judgments establishing custom or its instances and not oral evidence.

If a person relies upon a family, tribal or local custom in derogation of general law in support of his case, he must give full particulars of the custom in his pleadings and if judgments and decrees and documents exist in proof of a custom or its instances these are best proof of the custom and the person relying on the Custom should produce and exhibit them and oral evidence cannot be a proper substitute of documents.

MIRZA BAHADUR ALI AND OTHERS *versus* CH. SUNDAR DAS AND OTHERS IV, J. & K. L. R.

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RELIGIOUS ENDOWMENT—"Sankalap" in favour of Guru's son by a pious Hindu Lady—Improbability of a previous dedication by the same lady.

In a suit for ejectment, the plaintiff alleged that the house in dispute was dedicated by the Maharani, founder of the temple, to the temple and therefore after the dedication was completed the Maharani was left with no power to make a "Sankalap" of the house in favour of the defendant.

Held that dedication was not proved it was improbable to the last degree that if a pious Hindu lady of Maharani's disposition had already made a gift of the house to the temple, she would cancel the gift thirteen years and make a fresh gift in favour of another charity.

DHARAMARTH TRUST DEPARTMENT *versus* PT. MANORATH RAM, IV, J. & K. L. R.

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(1) EXECUTION OF DECREE—Compromise during execution proceedings—Compromise invalid—Effect on decree—An invalid compromise arrived at between the parties under a misapprehension of the law or of facts cannot have the legal effect of extinguishing the decree.

(2) LIMITATION ACT (IX of 1995)—Article 182—Execution of decree—Step in aid—Excessive amount claimed—Whether application invalid .

The mere fact that an excessive amount is claimed in execution than what is due to the decree holder would not make the application for execution invalid or not in accordance with law so as not to constitute a step in aid of execution. The test in such a case should be whether the Court could on such an application issue a process of execution.

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(1) EVIDENCE ACT (XIII of 1977)—Section 92 Proviso 2.

(2) Transfer of property Act (XLII of 1977) Section 54—Agreement for sale to be signed by both parties.

Agreement for sale is not valid and binding if it is not signed by both parties.

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**Must. ALLAH RAKHI *versus* CH. ALLAH DITTA AND OTHERS,
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Kashmiri is a class by itself as found in the list of agricultural classes vide schedule which relates to the Jammu Province.

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LAND REVENUE ACT (XII OF 1996)—

Section 31—presumption in favour of revenue entries rebuttable.

Entries in the revenue records are not by themselves conclusive evidence of title. The presumption of genuineness attachable to them under the law is rebuttable.

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LAND REVENUE ACT (XII OF 1996)—

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Any part of the land revenue paid according to the rates determined at the time of general assessment even if the assessment of such land revenue requires revision in consequence of the action of water etc, is refundable. The only remedy is to apply for special assessment under Section 52 (1) (e).

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LIMITATION ACT (IX OF 1995)—

Article 181 and 182 (7)—Instalment decree—Time from which period of limitation begins to run.

Article 181 applies to the enforcement of the default clause. If execution application is not made within three years from the date of default, the decree-holder's remedy for the enforcement of default clause becomes time-barred. As regards the execution for the instalments which are within time, article 182 (7) will apply and there is no reason why execution cannot be allowed for them.

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LIMITATION ACT (IX OF 1995)—

Article 181—Article applicable when decree cannot be executed with fulfilment of a condition.

Where in terms of the decree the right of the decree-holder to recover possession of property is contingent upon his paying certain sum of money to the judgment-debtor but no date for payment is specified, the right to recover possession accrues to the decree-holder immediately and at once.

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MOHAMMADAN LAW—LEGITIMACY—

Acknowledgment—Scope of doctrine-Presumption from marriage.

No statement made by one man that another (Proved to be illegitimate) is his son can make that other legitimate, but where no proof of that kind has been given such a statement or acknowledgment is substantive evidence that the person so acknowledged is the legitimate son of the person who makes the statement provided his legitimacy is possible.

RUSLA *v.* SHER MOHAMMAD AND OTHERS—4 J. & K. L. R.

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NUISANCE—PERMANENT NUISANCE—

Injunction to Municipality to restrain from keeping filth Depot near plaintiff's house—Defence that cannot be pleaded.

It is no defence that the plaintiff came to the nuisance, knowingly. It is no defence that the nuisance, although injurious to the individual plaintiff is beneficial to the public at large, nor is it any defence that the place from which the nuisance proceeds is a suitable one and that no other place is available in which less mischief would result.

MUNICIPAL COMMITTEE JAMMU *v.* K. S. MIAN NASIR-UD-DIN
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RIGHT OF PRIOR PURCHASE ACT (II OF 1993)—

Section 20—suit to enforce right of prior purchase when sale completed *i. e.*, after the sale deed is registered.

A suit for the exercise of the right of prior purchase can be brought by the plaintiff pre-emptor only after the sale is completed *i. e.*, after the sale deed is registered.

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TENANCY ACT (II OF 1980)—

Section 95 (1)h—Power of High Court to validate proceedings under mistake as to jurisdiction—who can make reference to High Court—what is “Revenue Court”.

Held by full bench that a Revenue officer is a Revenue Court if he exercises jurisdiction only with respect to any such suit as is described in sub-section (3) of Section 85 of the Tenancy Act. The scope of section 95 is limited to only those cases which come under sub-section (3) of Section 85.

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Appellate Civil.

Before Chief Justice (R. B. Ganga Nath).

P. DINA NATH—(PLAINTIFF)—APPELLANT
Versus
PT. SRI KANTH—(DEFENDANT)—RESPONDENT.

CIVIL 2ND APPEAL NO. 184 OF 2001.

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*Limitation Act (IX of 1995)—Articles 29 and 49—
Difference between the two Articles.*

The distinction between Articles 29 and 49 is that under Article 29 the suit is not for the recovery of any specific property but it is only for damages for wrongful seizure while under Article 49 the suit is for the recovery of specific property and not for any compensation for wrongful attachment under the legal process.

APPEAL AGAINST THE DECISION OF THE SENIOR
SUB-JUDGE, SRINAGAR, (PT. MUNNA LAL SHARMA)
DATED 17TH JETH, 2001.

MR. GANA LAL DHAR—For the Appellant.
MR. TARACHAND TIKOO—For the Respondent.

This is a second appeal by plaintiff arising out of a suit brought by him against defendant respondent

for recovery of money. The respondent had a decree against the plaintiff and other persons. The appellant had deposited in Court some money for a third person in another case. The respondent got a portion of that money which is now in dispute and for whose recovery the present suit has been brought, attached on 28th *Baisakh*, 1996 in execution of his decree and took it away on the 21st of *Har*, 1997. The plaintiff has brought this suit to recover the money which has been taken away by the defendant on the ground that he was not liable under the respondent's decree and that the respondent had no right to take away his (plaintiff's) money. The question whether the plaintiff appellant was liable under the respondent's decree and the respondent was entitled to realise any money from the appellant will have to be decided in the present suit. The lower Courts have held that Article 29 of the Limitation Act applied to the present suit and dismissed it as time barred. Article 29 does not apply to the present suit because it was not for compensation for wrongful seizure of movable property. In the present suit the appellant does not claim any damages for wrongful attachment but has brought it for the recovery of specific movable property of his which has been taken away by the defendant respondent. The Article which would apply to the present suit is Article 49 under which the period of limitation is three years and it would run from the time when the property was wrongfully taken away by the defendant, that is, from the 21st of *Har*, 1997. The distinction between Articles 29 and 49 is that under Article 29 the suit is not for the recovery of any specific property but it is only for damages for wrongful seizure while under Article 49 the suit is for the recovery of specific property and not for any compensation for wrongful attachment. The suit was brought on 10th *Poh*, 1999, that is within three years and was, therefore, not time barred. It is, therefore, ordered that the appeal be allowed with costs, the decree of the lower Court be set aside and the case be remanded to the trial Court to re-admit it under its original number and dispose of it in accordance with law.

Revisional Civil.*Before Mr. Justice J. N. Wazir.*SAMAD JOO MATHANJI—(PLAINTIFF)—APPLI-
CANT*Versus*REHMAN LONE AND ANOTHER—(DEFENDANTS)—
OPPOSITE PARTY.

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CIVIL REVISION (A. R. A.) NO. 90 OF 2001.

Evidence—Witness—Scribe of a bond—Evidentiary value of the deposition of a scribe.

The proposition, that the scribe should not be believed because he has written the document and he should depose in terms of that document, appears to be incorrect. If the scribe is a disinterested witness and gives statement on the basis of his personal knowledge there is no reason to disbelieve him.

If a scribe gives statement not on the basis of his personal knowledge but merely on what is stated in the document itself, then it is for the Court to see whether that statement should be relied upon or not.

REVISION AGAINST THE ORDER OF THE 2ND ADDITIONAL MUNSIFF, SRINAGAR, (SHEIKH ABDUL GANI) DATED 24TH JETH, 2001.

MR. S. N. DAR—For the Applicant.

MR. S. C. KOUL—For the Opposite Party.

This is a revision application arising out of a suit instituted by Samadjoo Mathanji, plaintiff, against Rehman Lone and another, for recovery of Rs. 150 on the basis of a bond dated 16th Baisakh, 1995. The plaintiff alleged that he advanced Rs. 100 to the defendants and the defendants executed the suit bond in his favour. Defendants admitted the execution of the bond, but denied the receipt of the consideration. Their plea was that they were made to execute the bond by fraud. The trial Court of the second Additional Munsiff, Srinagar, dismissed the suit on the ground that the plaintiff had not been

able to establish passing of the consideration to the defendants. The plaintiff has come up in revision.

The sole question for determination in this application is whether the plaintiff has advanced Rs. 100 at the time the suit bond was executed. The plaintiff has produced the scribe of the document who deposed that Rs. 100 were advanced by the plaintiff to the defendants in his presence and the latter executed the bond in favour of the plaintiff. The trial Court has not believed the evidence of the scribe on the ground that the scribe has to depose in terms of what he has written in the bond and, therefore, his evidence should not be believed. He has further referred to a certain judgment of this Court which is not cited in his order. As the judgment of this Court has not been cited, I could not go through that judgment, but the proposition laid down by the learned Munsiff that the scribe should not be believed because he has written the document and he should depose in terms of that document, appears to be incorrect. If the scribe is a disinterested witness and gives statement on the basis of his personal knowledge, there is no reason to disbelieve him. The Courts have to see whether a witness is telling the truth or not. The witness sometimes in order to favour a party would not tell the truth and would give evidence in favour of that party. But if the witness is found to be absolutely disinterested and he on oath states on the basis of his personal knowledge that the amount has been advanced to the defendant, his evidence should not be lightly brushed aside. If a scribe gives statement not on the basis of his personal knowledge but merely on what is stated in the document itself, then it is for the Court to see whether that statement should be relied upon or not. But in the present case the scribe appears to be disinterested witness and he has on the basis of his personal knowledge said that the amount was paid in his presence to the defendants and the latter executed the suit bond in favour of the plaintiff. This evidence is supported by the evidence of the plaintiff himself and also by the averments made by the defendants in their written statement that the bond was executed by them. The case of the defendants was that they were made to execute the bond by fraud. No evidence has been adduced by

the defendants to prove any fraud practised upon them. In fact they have alleged that they have paid more than what was due from them to the plaintiff, which further supports the claim of the plaintiff. The evidence of the scribe coupled with the evidence of the plaintiff and the pleas of the defendants prove satisfactorily the claim of the plaintiff.

It has been argued on behalf of the respondent that the plaintiff in his statement mentioned that he would not charge any interest on the amount advanced and that his claim for interest should not be allowed. I have gone through the statement of the plaintiff and it appears that no interest was agreed upon at the time the amount was advanced to the defendants. Moreover, the plaintiff has not served any notice on the defendants calling upon them to pay interest on the amount advanced. In these circumstances the plaintiff's claim for interest cannot be allowed. I, therefore, allow this application, set aside the judgment and decree of the trial Court and decree the plaintiff's claim to the extent of Rs. 100 with proportionate costs throughout. The defendants will pay the decretal amount by instalments of Rs. 15 per harvest to be paid in the months of *Maghar*, 2001 and *Har*, 2002 and so on. In case of two consecutive defaults, the plaintiff shall be entitled to recover the decretal amount in lump.

Appellate Civil.

*Before Mr. Justice J. N. Wazir
and
Mr. Justice Masud Hasan.*

2001

KOTHI SAMAD-JOO ABDULLAH JOO—(JUDG- Assuj 17
MENT-DEBTOR)—APPELLANT
Versus
KOTHI ANAND RAM AND SONS—(DECREE-
HOLDER)—RESPONDENT.

CIVIL 2ND APPEAL NO. 24 OF 2001.

*Limitation Act (IX of 1995)—Article 182—Execu-
tion of decree—Compromise decree—Taking out*

execution for the full amount when default made in the payment of one instalment—Limitation to begin from the date when first default takes place.

The decree-holder has an option either to claim the instalments which have fallen due on the date when the execution is taken out or he can take execution for the full amount. When the decree-holder chooses the latter course, the period of limitation will run from the date when the first default takes place.

An executing Court can go behind the decree in order to see whether the decree which has followed the compromise is in terms of the compromise.

A. I. R. 1933 All. 253, referred to.

APPEAL FROM THE DECISION OF THE DISTRICT JUDGE, SRINAGAR, (LALA BARKAT RAI) DATED 10TH BAISAKH 2001.

MR. S. N. DHAR—For the Appellant.

MR. SARWANAND KOUL—For the Respondent.

Per Wazir J.—This is judgment-debtor's second appeal and arises out of execution proceedings. The decree-holder respondent obtained a decree on the basis of a compromise for Rs. 1,150 on 30th *Katik*, 1992, from the Court of the City Judge, Srinagar. According to the compromise the amount sued for had to be paid to the decree-holder by instalments of Rs. 191-10-0, each instalment to be paid in the month of *Maghar* each year. It was further provided in the compromise that in case there was default in payment of one instalment the decree-holder would be competent to recover the whole amount in lump. A decree followed in terms of the compromise and it appears that the judgment-debtor did not pay the instalment due from him on the date specified in the decree. The decree-holder took out execution on the 30th *Maghar*, 1996, and claimed Rs. 920-0-3. The judgment-debtor was not served and the execution application was consigned to the record-room. Another application was made by the decree-holder on 29th *Phagan*, 1999, claiming Rs. 840 from the judgment-debtor.

The judgment-debtor took an objection that the execution application was time barred. The executing Court held that the execution application was within time. The judgment-debtor appealed and the learned District Judge also came to the conclusion that the execution application was within time; hence this second appeal.

The only question for determination in this appeal is whether the execution application is within time. In the compromise it is mentioned that if there is a default in the payment of one instalment the decree-holder will be competent to take out execution for the full amount. In the decree which followed the compromise it was mentioned that if there was a default in the payment of an instalment the decree-holder could recover the full amount. The Courts below have held that the decree-holder could enforce the default clause only on the default taking place in regard to all the instalments and have held that the execution application was within time. This view appears to be incorrect. The learned counsel for the appellant has drawn our attention to a ruling of the Allahabad High Court reported as 1933 page 253 in which it has been held that an executing Court can go behind the decree in order to see whether the decree which has followed the compromise is in terms of the compromise. In the compromise it is mentioned, as stated above, that in case there is a default in payment of one instalment the decree-holder can recover the full amount. It is not disputed that there was a default made in the payment of first instalment. The decree-holder took out execution in the year 1996 and he claimed the full amount due from the judgment-debtor which shows that he enforced the default clause and claimed the full decretal amount from the judgment-debtor. The decree-holder had an option either to claim the instalments which had fallen due on the date when the execution was taken out or he could have, as he has done in this case, taken out execution for the full amount. When the decree-holder has chosen the latter course *i. e.*, when he has taken out execution for the full amount, the period of limitation would run from the date when the first default took place *i. e.*, on 30th *Maghar*, 1992. The execution was taken out in 1996 and the subsequent

application was made in 1999 which was clearly barred by time.

We, therefore, allow this appeal, set aside the order of the Courts below and hold that the execution application is barred by time. In the peculiar circumstances of the case we leave the parties to bear their own costs in this Court.

Full Bench.

2001

Magh 19

Before the Chief Justice (R. B. Ganga Nath),

Mr. Justice J. N. Wazir

and

Mr. Justice Masud Hasan.

AMAR NATH—(PLAINTIFF)—APPLICANT

Versus

SULEMAN AND OTHERS—(DEFENDANTS)—OPPOSITE
PARTY.

CIVIL REVISION NO. 104 OF 2001 (A. R. A.).

Limitation Act (IX of 1995)—Articles 104 and 105—Instalment bond providing that if default be made in payment of one or more instalments, the whole shall be due—Date from which time begins to run (1) when the whole sum has become due (2) when any instalment is due.

Per C. J.—Under column 3 of Article 105 time of limitation would run from the date of the default in the payment of any instalment or when the whole amount falls due. As the time of limitation, at the option of the plaintiff, would run from the date of default in the payment of any instalment, it is open to the plaintiff to bring his suit for such instalments as may be within time. If the suit is for the whole amount the time of limitation would run from the date of the first default on which the whole amount becomes due.

If a case is directly covered by the language of column 1 of Article 105, namely, it is a case of a suit

brought on a bond payable by instalments which provides that if default be made the whole shall be due and the suit is brought after the whole has become due then there is no escape from Article 105. The creditor can not by merely saying that he chooses to give up a part of the whole amount due, fall back on the provisions of Article 104 and say that he will now claim only instalments and take advantage of a different starting point of limitation.

Per Masud Hasan J.—The only difference between Article 104 and 105 of the Limitation Act consists in the option of claiming the whole sum obtaining to the creditor in terms of the default clause. When this option is exercised and the default clause invoked, the suit falls under Article 105. In such event the starting point of time for the purposes of limitation is the date of the first default. If on this calculation, the suit is found to be beyond time, it is not open to the plaintiff to turn round and pray that a decree for such of the defaulted instalments as may be found to be lying within time may be passed. This would be reversion to Article 104 and changing the entire nature of the suit. It would further be superimposing upon the terms of the default clause and multiplying the options limitlessly.

2 J. and K. L. R. 126 referred.

REVISION AGAINST THE ORDER OF THE MUNSIFF,
MIRPUR, (QAZI MOHAMMAD NIZAM-UD-DIN) DATED
29th MAGH, 2000.

MESSRS DINA NATH AND JASWANT SINGH—For the Applicant.

MR. HAMID ULLAH—For the Opposite Party.

Per C. J.—This case has been referred to Full Bench on account of the importance of the point involved in the case. This was plaintiff's revision against the decree of the lower Court dismissing his suit. The suit was on a bond to recover Rs. 78-8-0 for balance of the money due on account of 13 instalments. Under this bond the first instalment of Rs. 5-2-0 was to be paid in *Magh*, 1989, and the second instalment of Rs. 6 in *Har*, 1990. Subsequently instalments of Rs. 6 each were to be paid in *Magh* and *Har* each year,

The plaintiff's case was that the instalments up to *Har*, 1995, had been paid and default in payment was made in the instalment due in *Magh*, 1995. The lower Court found that no instalment had been paid and the suit was time-barred and dismissed the suit.

It was contended on behalf of the applicant that under Article 104 of the Limitation Act the plaintiff could bring a suit for some of the instalments which were within time. The first question for consideration, therefore, is which article would apply to the suit. Article 104 applies to simple bonds or promissory notes payable by instalments, in which case time begins to run from the expiration of the term of payment. Article 105 applies to suits on promissory notes or bonds payable by instalments, which provide that if default be made in payment of one or more instalments, the whole shall be due. It is intended to apply to the particular case of instalment bonds where there is a default clause of the nature afore-mentioned. If there were no such default clause, then Article 104 would apply.

It may be mentioned that the mere fact that a bond contains a default clause would not necessarily make Article 105 applicable if the nature of the claim or the character of the suit be different, for instance, where some other covenant in the document is being sought to be enforced. Other cases also where, although there is a bond with a default clause, and Article 104 would apply, can be conceived. Such an instance would be where the suit is brought for the recovery of the instalment that has fallen due and before there is such a default as makes the whole amount become due. In such a case, although the bond is a bond payable by instalments and there is a default clause, Article 104 would nevertheless be applicable. But where column 1 of Article 105 is in terms applicable, then Article 104 cannot be applied. If the whole sum has become due and the suit is to recover either the whole of that sum or any fraction of that amount Article 105 would be applicable to that suit. If, however, the whole sum has not become due either on account of there having been no default at all or on account of some special language of the document then Article 105 would not be applicable.

If a case is directly covered by the language of column 1 of Article 105, namely, it is a case of a suit brought on a bond payable by instalments which provides that if default be made the whole shall be due and the suit is brought after the whole has become due then there is no escape from Article 105. The creditor cannot, by merely saying that he chooses to give up a part of the whole amount due, fall back on the provisions of Article 104 and say that he will now claim only instalments and take advantage of a different starting point of limitation. The main question is whether the amount had become due which entitled the plaintiff to sue for the whole amount. It is immaterial whether he is suing for the whole of that amount or only a part of it.

The point for consideration is whether there is any justification for holding that even if the whole amount has become due on a bond payable in instalments with a default clause, time has not begun to run against the creditor for part of that amount. To hold that, although limitation has run out under Article 105 which applied to the facts the creditor can still fall back on Article 104, would be tantamount to holding that the starting point of limitation for the purposes of recovering one and the same amount are different when the claim is to recover the whole or when it is to recover a part of it.

The present case falls under the first column of Article 105 and Article 105 applies to the suit.

Under this article the starting point of limitation is the date of the default of any instalment or when the whole amount falls due. In British India under Article 74 of the Limitation Act a creditor has been given the right to waive the benefit of the default. If he waives the benefit of his first default the time of limitation would run from the date of the next default. In our Limitation Act no question of waiver arises because the creditor has been given the option of bringing his suit on the default in the payment of any instalment or when the whole amount falls due. Under column 3 of Article 105 time of limitation would run from the date of the default in the payment of any instalment or when the whole amount falls due. As the time of limitation

at the option of the plaintiff, would run from the date of default in the payment of any instalment, it is open to the plaintiff to bring his suit for such instalments as may be within time. If the suit is for ~~the~~ whole amount the time of limitation would run from the date of the first default on which the whole amount becomes due.

In the present case the suit has been brought for the whole amount and not for the defaulted instalments only. Indeed some of the instalments had not even fallen due at the time of the institution of the suit. The plaintiff wanted to take advantage of default clause and if default clause had to be enforced the amount fell due in the year 1990 when the first default took place as has been found by the trial Court. The suit was brought on the 1st of *Har*, 2000 and under Article 105 the suit is barred by time.

Per Masud Hasan J.—I agree. I had occasion to revert to this matter at length in *Safar Chand versus Sardar Ali and others*, 2, J. & K. L. R. 126. It is clear enough that the only difference between Article 104 and 105 of the Limitation Act consists in the option of claiming the whole sum obtaining to the creditor in terms of the default clause. When, therefore, this option is exercised and the default clause invoked, the suit falls under Article 105. In such event the starting point of time for the purposes of limitation is the date of the first default. This is the only possible conclusion to be derived from an application of Article 105 to the terms of the default clause contemplated therein. If on this calculation, the suit is found to be beyond time, it is not open to the plaintiff to turn round and pray that a decree for such of the defaulted instalments as may be found to be lying within time, may be passed. This would be reversion to Article 104 and changing the entire nature of the suit. It would, further, be superimposing upon the terms of the default clause and multiplying the options limitlessly. The weight of judicial authority is against such a one-sided view in favour of the creditor.

ORDER OF THE COURT.

The application is dismissed with costs.

Appellate Civil.

*Before Chief Justice (R. B. Ganga Nath)
and*

Mr. Justice Masud Hasan.

MST. MOHAMMAD JAN AND OTHERS—(DEFENDANTS)—
APPELLANTS

2001

versus

Maghar
11

MOMAN SHAH—(PLAINTIFF)
MST. REHMAT NOOR AND
OTHERS—(DEFENDANTS) } —RESPONDENTS.

CIVIL 2ND APPEAL NO. 222 OF 2001.

Mohammedan Law—Marriage—Minor girl giving authority to her father to consent on her behalf to her Nikah—No valid marriage—How a minor girl is to be given in marriage.

If a girl is a minor, no question of her giving authority to her father to consent on her behalf to her Nikah can arise. The consent of a minor contracting party is a matter of no account because of the disability the minor is under. In Mohammedan Law the matter of the contract of marriage is no more but certainly no less than a matter of civil contract. Ijabo Qabool or proposal and acceptance can take place only between the contracting parties to be valid.

If a girl is a minor at the time of the marriage, then she can be given in an irrepudiable contract of marriage only by her father or her father's father. In other cases she has a clear option of puberty.

APPEAL FROM THE DECISION OF THE DISTRICT JUDGE, SRINAGAR (LALA BARKAT RAI), DATED 10TH BHADON, 20 I.

Mr. AHMAD YAR—For the appellants.

Mr. A. N. KAK—For the respondents.

Per Masud Hasan J.—This is the defendants'

second appeal arising out of a suit for restitution of conjugal rights and permanent injunction. The restitution of conjugal rights is sought against defendant No. 1 *Mst. Mohammed Jan* and the permanent injunction against defendants 2 to 5 against whom it is alleged that they interfered with *Mst. Mohammed Jan's* returning to her husband, the plaintiff. The plaintiff's allegations were that he was married to *Mst. Mohammed Jan* on 16th *Baisakh* 1996 and that she had lived in his house for more than two years and that the marriage was duly consummated.

On behalf of defendant No. 1 it was pleaded that she was minor at the time the marriage is alleged to have taken place and was minor even at the time of the institution of the suit. It was contended that no marriage had taken place.

Both the Courts below have decreed the plaintiff's suit. The Courts have found that defendant No. 1 had attained majority at the time of the institution of the suit but that she was a minor when the marriage was contracted in the year 1996. It has been further found unanimously by both the Courts below on medical evidence that no consummation of the marriage had taken place. A decree in favour of the plaintiff was passed on the basis that "*Ijabo Qabool*" between the parties was proved and therefore the marriage was a valid marriage. Here considerable confusion seems to have been imported. If the girl was a minor at the time of the alleged marriage, *i. e.*, 16th *Baisakh*, 1996, then she could be given in an irrepudiable contract of marriage only by her father or her father's father. In other cases she had a clear option of puberty. Secondly, "*Ijabo Qabool*" or proposal and acceptance could take place only between the contracting parties to be valid. Because of the peculiar nature of the contract of marriage in which one of the parties amongst Mohammedans is almost invariably in purdah at the time of the contract, the requirement of the witnesses and a vakil of marriage are not a matter of mere formality but of the very essence. To the argument advanced before the Court below that the girl was a minor and she was entitled to repudiate her marriage on becoming a major (an argument, it may be stated, that does not

necessarily arise because the plea of the defendant was not with regard to the exercise of option of puberty but was to the effect that no valid marriage had taken place) the Court's answer is as follows: "From the statements of Mahwali *Lumberdar*, Mahwali son of Hashim and Moulvi Abdulla *Nika Khan* it is proved that Mst. Mohammed Jan had given authority to her father Samandar Shah to give consent on her behalf to her *Nikah* with the plaintiff respondent." This is where the Court has completely mis-directed itself. If Mst. Mohammed Jan was a minor no question of her giving authority to her father to consent on her behalf to her *Nikah* could arise. The consent of a minor contracting party is a matter of no account because of the disability the minor is under. It is but common place that if the consent of a minor had been a matter of any significance there was no point in rejecting contracts made by minors. It has been pointed out again and again that in Mohammedan Law the matter of the contract of marriage is no more but certainly no less than a matter of civil contract and there is no reason to let down in this case the standards appertaining to the Law of Contract. Samandar Shah, the father of the girl, was entitled to contract away in marriage his daughter, defendant No. 1, himself. He is defendant No. 2. He is the person who is now denying the factum of marriage. He has not been produced by the plaintiff but he has appeared in the witness box himself. He has totally denied any marriage having taken place or Mst. Mohammad Jan having gone to reside with the plaintiff. In these circumstances very convincing evidence was required to prove that Samandar Shah had, as a matter of fact, exercised his right to give his minor daughter in contract of marriage. That evidence is wholly lacking.

The plaintiff's evidence consists of a number of witnesses some of whom belong to his own village and say only that defendant No. 1 was living in the plaintiff's house for about two years. Such of those who are alleged to be the witnesses of the marriage i. e., Mahwali son of Jumma *Lumberdar*, Mahwali son of Hashim and Moulvi Abdulla, the person who is alleged to have recited the *Nikah*, do not throw any light upon the question. Mahwali son of Jumma says that Mohammed Amin and Ghulam Rasul were the witnesses of the marriage and that they had gone

inside and had said on coming out that Mst. Mohammed Jan had given herself away in marriage to Moman Shah. Let him be quoted verbatim :

Gawahan ne bahir akar kaha keh mussammat Jan Mohd ne Moman Shah mudai ko apna nafs diya.

He further says that Mst. Mohammed Jan had given authority to her father to marry her. More or less to the same effect is the evidence of Mahwali son of Hashim. This evidence is both inadmissible and absurd. It is inadmissible because it has not been shown that Mohammed Amin and Ghulam Rasul are no more alive and available and in the absence of some such proof the evidence of these witnesses is mere hearsay. It is here where the Court has treated the matter of the witnesses of marriage as a matter of mere formality. The purpose of having witnesses of marriage is only that they should come forward and depose what has happened when any controversy about the matter arises. The evidence is absurd because, as has been stated above, the question of the consent and authority by the minor Mohammed Jan does not arise if the father was there and had the right to give away the daughter in marriage. The evidence of Moulvi Abdulla remains to be discussed. He is a regular reciter of *Nikahs* and keeps a register but he deposed to have recited this *Nikah* gratuitously for Mohammed Din and has therefore not entered it in his register. Apart from this, his evidence is as good or as bad on the vital matter of the legality of marriage as that of the other two witnesses. He says that the girl had given authority to her father to marry her away in the presence of the witnesses of the marriage, *i. e.*, Mohammed Amin and Ghulam Rasul and it was upon that authority that the father had accepted the proposal of marriage on behalf of his daughter. All this has no bearing upon a legally valid marriage of a Mohammedan minor. Nobody says that the father gave the girl away in marriage. On the contrary the evidence produced negatives that assumption. This is all the evidence that has been produced on behalf of the plaintiff. This evidence has been considered by the Court to be sufficient proof of the defendant's marriage and this has been done even after the Court has quoted

correctly the legal proposition from Mulla's book that the contract of marriage is valid and binding only when the minor has been contracted in marriage by the father.

On behalf of the defendants the evidence is to the effect that some kind of ceremony had taken place in which the marriage could not be performed because the question of the caste of the bride-groom arose and it was asserted on behalf of the defendants that the marriage would take place only if it would be proved to their satisfaction that the bride-groom was of the same caste as the bride. It is said that only a betrothal engagement had taken place and that the marriage itself had remained abortive. It is further stoutly denied that the girl went to the house of the plaintiff. There is one remark in the evidence of a witness of the defendant, namely Sher Khan, upon which reliance has been placed by the Court below. Sher Khan said in his evidence that he had heard that "*Ijabo Qabool*" had taken place. The whole gist of his evidence is that on the date when the ceremony had taken place and people had come from the bride-groom's house he had accompanied them to the house of Samander Shah and had parted before entering it. He said that he had heard the next morning that only a betrothal had taken place and that he had remonstrated with the father of the bride that when a betrothal had taken place why he was not willing to perform the marriage. Read in its proper context it would appear that this witness was using "*Ijabo Qabool*" for the purpose of betrothal (*rishta*) and not for the marriage itself. It appears that he has been using the phrase "*Ijabo Qabool*" in the same confusing manner in which the Court below has used it. The version of the defendants appears to be true because it will be found that there is disparity of caste among the parties. The bride appears to belong to a Syed family as indicated by a judgment filed in the suit on behalf of the defendants.

Be as it may, the fact remains that there is no proof of a legal marriage having taken place on the record of this case and what has been asserted on behalf of the plaintiff to have taken place would no

amount to a legally valid marriage. The result, therefore, is that this appeal is allowed with costs and the judgment and decree of the Court below are set aside. The plaintiff's suit will stand dismissed.

Appellate Civil.

2000

Before Chief Justice (R. B. Ganga Nath).

awan 4 AZIZ SOOFI AND ANOTHER—(PLAINTIFFS)—AP-
PELLANTS

Versus

QADIR MANROO AND ANOTHER—(DEFENDANTS)—
RESPONDENTS.

CIVIL 2ND APPEALS NOS. 80 AND 88 OF 2001.

Mohammedan Law—Guardianship—Power of mother as de facto guardian to alienate immovable property of her minor son—Sale void—Subsequent ratification by minor upon attaining majority immaterial.

Under the Mohammedan Law a person who has charge of the person or property of a minor without being his legal guardian and who may, therefore, be conveniently called a 'de facto guardian' has no power to convey to another any right or interest in immovable property which the transferee can enforce against the infant; nor can such transferee, if let into possession of the property under such unauthorised transfer resist an action in ejectment on behalf of the infant as a trespasser.

I. L. R. XLV Cal. 878 (P. C.) referred to.

A transaction amounting to an alienation of an immovable property belonging to a Mohammedan minor by the de facto guardian of the minor is void and as such there can be no question of ratification of the transaction by the minor upon his attaining majority.

A. I. R. 1936 Allah. 837 (F. B.) referred to.

APPEALS AGAINST THE DECISION OF THE SENIOR
SUBORDINATE JUDGE, SRINAGAR, (PT. RAM NATH

SHARMA AND PT. MUNNA LAL SHARMA) DATED 8TH POH, 2000 AND 21ST BAISAKH 2001, RESPECTIVELY.

MR. SHAMBU NATH DAR—For the Appellants.
MR. SUNDAR LAL—For the Respondents.

These are two second appeals by plaintiffs arising out of a suit brought by them against the defendant respondent to recover possession over a plot of land described in the plaint which had been sold by their mother during their minority to the defendant respondent, Qadir Manroo. The defendant raised all sorts of contentions as regards the validity of the sale. The trial Court decreed the plaintiffs' suit on the condition that they would get possession on payment of Rs. 200 to the respondent who would be entitled to remove the material of his construction on the land in dispute. Both the parties went in appeal to the lower Court. Before the plaintiffs could file an appeal the appeal filed by the defendant respondent, Qadir Manroo, was heard *ex parte*, the decree of the trial Court was set aside and the plaintiffs' suit was dismissed. The plaintiffs' appeal was dismissed on the ground that after the decision of the defendant respondent's appeal their appeal was not maintainable. The plaintiffs have filed these appeals from the decree passed against them in both the appeals in the lower Court.

The only question for determination is whether the sale of immovable property of the plaintiffs appellants made by their mother during their minority in favour of the defendant respondent is valid and binding. The lower Court has relied on *Imambandi v. Mustaddi* I. L. R. XLV Calcutta 878 Privy Council, but it is difficult to understand how the lower Court has gone wrong. It appears that the lower Court did not read the whole of the judgment in this case carefully otherwise the mistake committed by it would not have been committed. It has been definitely decided by their Lordships that such sale is absolutely void. They have observed at page 898 :—"In their opinion, the Mohammedan Law, for obvious reasons, makes a distinction, and a sharp distinction, between 'goods' and 'chattals' (mata) and immovable property (a'kar) with regard to the

powers of dealing by guardians." They have further observed at page 903 ; " For the foregoing considerations, their Lordships are of opinion that under the Mohammedan law a person, who has charge of the person or property of a minor without being his legal guardian and who may, therefore, be conveniently called a ' *de facto* guardian ' , has no power to convey to another any right or interest in immovable property which the transferee can enforce against the infant ; nor can such transferee, if let into possession of the property under such unauthorised transfer, resist an action in ejectment on behalf of the infant as a trespasser. It follows that, being himself without title, he cannot seek to recover property in the possession of another equally without title." It was contended by the learned counsel appearing on behalf of the respondent that one of the plaintiffs ratified the sale on attaining majority in *Bhadon*, 1995. The sale being void no question of ratification could arise. In *Mst. Anto v. Mst. Reoti Kuar and others*, A. I. R. 1936 Allahabad 837 (F. B.) it was held :—" A transaction amounting to an alienation of an immovable property belonging to a Mohammedan minor by the *de facto* guardian of the minor is void and as such there can be no question of ratification of the transaction by the minor upon his attaining majority." The sale, therefore, is absolutely void and the defendant cannot resist the plaintiffs' suit for ejectment.

It was contended by the learned counsel for respondent that the decree of the trial Court cannot be challenged. His contention is based on the ground that the appeal of plaintiffs appellants in the lower Court from the decree of the trial Court was held as not maintainable. This contention is without force. The lower Court held that the plaintiffs' appeal was not maintainable and dismissed it because the defendant's appeal from the decree of the trial Court had already succeeded and the decree of the trial Court had been set aside and the plaintiffs' suit had been dismissed. The position now is different. The decree of the lower Court in favour of the defendant dismissing the suit has been set aside, and the plaintiffs can challenge the decree of the trial Court in their appeal.

The sale, as already stated, is absolutely void and the plaintiffs are not liable to pay any part of the sale consideration. It is, therefore, ordered that the appeals be allowed with costs, decrees of the lower Court be set aside and the plaintiffs' suit for possession be decreed with costs.

The plaintiffs appellants have no objection to the removal of the materials by the defendant respondent. It will be open to the defendant respondent to remove materials within six months from to-day, if he so likes.

Appellate Civil.

Before Mr. Justice Masud Hasan.

MUNICIPAL COMMITTEE SRINAGAR—(DEFENDANT)—APPELLANT

Versus

PANDIT SRI KANTH KOUL—(PLAINTIFF)—RESPONDENT.

CIVIL 2ND APPEAL NO. 19 OF 2001.

2001

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Municipal Act (XIII of 1998)—Section 153—Building constructed in contravention of rules and the permission given—Municipal Committee ordering demolition of that portion of the building which was constructed in contravention of the permission—Objection that Municipal Committee did not exercise discretion vested in it in a proper manner.

The question of the exercise of discretion by the Municipal Committee under the Municipal Act is a matter of its own concern. All that the person against whom order of demolition of building is passed is entitled to is to show that the action against him is not in accordance with law or in other words that there has been infringement of his civil rights. If he has not been able to establish it or if it is established against him that he himself is a transgressor and comes within the mischief of the punitive sections of the Municipal Act, it is not for him to come and plead in a Court of law

that the Municipal Committee should be asked to take action in a certain way.

APPEAL AGAINST THE DECISION OF THE SENIOR
SUB-JUDGE, SRINAGAR, (PT. MUNNA LAL SHARMA)
DATED 15TH JETH, 2001.

MR. SUNDER LAL—For the Appellant.

MR. RADHA KISHEN--For the respondent.

This civil second appeal arises out of a suit for injunction preferred against the Municipal Committee of Srinagar praying that it be restrained from demolishing a certain house or a part of the house in Karfali Mohalla, Srinagar.

The allegations made in the plaint were that in the course of the construction of a certain building for which permission was obtained from the Municipal Committee the plaintiff did not contravene any of the provisions of the Municipal Act or its bye-laws, that he conformed with all the conditions that were laid down for the purpose of making the constructions, that the Municipal Committee considered that a part of this construction was in contravention of the rules of the Municipality and the permission given to the plaintiff and that on that score it proceeded to demolish that portion of the building which was constructed in contravention of the permission. The injunction was sought to restrain the Municipality from doing so.

The Municipal Committee contested the suit and pleaded that a certain portion of the house was constructed in contravention of the rules and the permission given to the plaintiff. It was stated that the plaintiff was given permission to construct three floors of his new house but he had put up a construction on the third floor which was equivalent to putting up a fourth floor. The action against the plaintiff was taken by a resolution passed by the Municipal Committee on 26th Jeth, 1999 on the complaint made by one Shiv Ram Trakru. A number of allegations were made by this man against the plaintiff but that with regard to the construction of the fourth floor was substantiated. After the passing of the resolution

by the Municipal Committee the plaintiff preferred an appeal as was provided in the Municipal Act to the Minister-in-charge and failed. Thereupon he brought this suit for injunction.

In this suit both the Courts below have come to the finding that the plaintiff has transgressed the conditions of the permission given to him for constructing the house and has to that extent contravened the provisions of the Municipal Act. They have also virtually held that the action of the plaintiff fell within the mischief of paras 3 and 4 of the bye-laws of the year 1896 by which the case of the parties is governed. After recording this finding both the Courts have decreed the plaintiff's suit mainly on the consideration that the action taken by the Municipal Committee by way of ordering the demolition of the unauthorised portion of the construction was much too severe and that the Municipal Committee had not exercised its discretion judicially. It may be stated here that the Municipal Committee had ordered the demolition of that portion which was found to have been constructed without permission. An attempt was made by the learned counsel appearing on behalf of the plaintiff respondent that there was no transgression. It is found otherwise unanimously by the Courts below and is a matter which cannot be agitated at this stage in the course of second appeal.

It was next argued that the Municipal Committee had not exercised the discretion vested in it in a proper manner. The question of the exercise of discretion by the Municipal Committee under the Municipal Act is a matter of its own concern. All that the plaintiff is entitled to is to show that the action against him is not in accordance with law or in other words that there has been infringement of his civil rights. If he has not been able to establish it or if it is established against him that he himself is a transgressor and comes within the mischief of the punitive sections of the Municipal Act, it is not for him to come and plead in a Court of law that the Municipal Committee should be asked to take action in a certain way. If the Municipality has the power to take a certain action, it is not for the plaintiff to object to it if he has really transgressed the rules

made by it. I cannot imagine that the remedy by way of demolition of that portion of the building which has been deliberately constructed against the permission granted by the Municipal Committee is too severe. It is true that in certain cases of misunderstanding arising out of the rules or permission given when constructions of a permanent character are made which would affect other portions of the building, demolition may not be resorted to and compensation may be demanded instead. But such is not the case here. The construction in the present case stands by itself and is in addition to those portions of the building for which permission was granted by the Municipal Committee and in that event demolition is the only remedy. The plaintiff's suit fails. The judgment and decree of the lower Court is set aside. The plaintiff's suit shall stand dismissed with costs throughout.

Full Bench.

2001
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*Before the Chief Justice (R. B. Ganga Nath),
 Mr. Justice J. N. Wazir
 and
 Mr. Justice Masud Hasan.*

SARDAR GOBIND SINGH—(PLAINTIFF)—APPEL-
 LANT

Versus

GAURI SHANKER AND ANOTHER—(DEFENDANTS)—
 RESPONDENTS.

CIVIL 2ND APPEAL NO. 197 OF 2001.

*Right of Prior Purchase Act (II of 1993)—
 Occupancy rights—Sale of occupancy rights or creation
 of occupancy rights—Whether the grant or creation
 of occupancy rights by a proprietor for consideration
 is tantamount to sale liable to pre-emption.*

*There is appreciable difference between sale of
 occupancy rights and the creation or grant thereof
 by the proprietor. For agricultural land as it is contem-
 plated in the Prior Purchase Act the definition of
 'land' obtaining in the Land Alienation Act is adopted*

and according to it "any right of occupancy" also falls under the category.

If the proprietor retains for himself no right of re-entry and purports to transfer all rights there is no difficulty in holding such a transaction as an out and out sale. If on the contrary, the incidents of proprietorship, in whatever degree it may be, are retained by the proprietor and if the tenant virtually gets no more than the rights of an occupancy tenant as defined in the Tenancy Act, then the transaction is only a grant of occupancy rights and not of sale. No right of pre-emption can be asserted when there is a clear case of conferment or grant of occupancy rights.

CIVIL 2ND APPEAL AGAINST THE DECISION OF THE DISTRICT JUDGE, JAMMU, (PANDIT RAM NATH SHARMA) DATED 32ND JETH 2001.

MR. CHAMAN LAL—For the Appellant.

MR. DINA NATH MAHAJAN—For the Respondents.

Per Masud Hasan J.—On the 11th Phagan, 1997, the defendants Nos. 2 and 3 executed a document in favour of defendant No. 1 purporting to grant occupancy rights in certain land for a cash consideration of Rs. 350.

The plaintiff's case is that this transaction is pre-emptible because it is sale of land as defined under the Prior Purchase Act. Defendants 2 and 3 are the proprietors of the land in dispute which was not an occupancy holding. The plaintiff asserted a preferential right and preferred this suit for possession in terms of the Prior Purchase Act.

On behalf of the defendants it was contended that the plaintiff had no right of pre-emption, that the transaction was not that of sale, that it was only a grant of occupancy rights and that there was no right of pre-emption in respect of such a transfer.

The Court of first instance held that the transaction was one of sale and decreed the plaintiff's suit. This judgment was overset by the lower appellate Court which held that by this transaction the defendants Nos. 2 and 3 did no more than create

occupancy rights. They included in the document only such conditions as were permissible under the Act and that therefore the transaction cannot be termed to be a sale. On these grounds the plaintiff's suit was dismissed.

The question before us, in the first instance, is whether the grant or creation of occupancy rights by a proprietor for consideration is tantamount to sale liable to pre-emption under the Prior Purchase Act. If so, the question secondly would be one of fact: Whether the transaction in dispute is really of sale of land or of grant in creation of the rights of occupancy.

There is appreciable difference between sale of occupancy rights and the creation or grant thereof by the proprietor. For agricultural land as it is contemplated in the Prior Purchase Act the definition of 'land' obtaining in the Land Alienation Act is adopted and according to it "any right of occupancy" also falls under the category. This right is, therefore, a subject matter of pre-emption. The chief point for consideration is : when a proprietor purports to create occupancy rights in favour of some person for consideration, is the transaction necessarily one of sale. The answer to this question in the abstract is simple enough. If the proprietor retains for himself no right of re-entry and purports to transfer all rights there is no difficulty in holding such a transaction as an out and out sale. If, on the contrary, the incidents of proprietorship, in whatever degree it may be, are retained by the proprietor and if the tenant virtually gets no more than the rights of an occupancy tenant as defined in the Tenancy Act, then the transaction is only a grant of occupancy rights and not of sale. It will be readily conceded that no right of pre-emption can be asserted when there is a clear case of conferment or grant of occupancy rights.

Whether a transaction falls in one or the other of the categories adumbrated above, is a question of fact and must depend upon the circumstances of each case. In the present case we have had the document read in extenso before us. We find that the

defendants Nos. 2 and 3 have virtually deprived themselves of practically every symbol of ownership in the land. There is an absolute transfer in favour of the defendant No. 1 and his 'Oulad' i. e., a transfer in perpetuity generation after generation. There is a definite provision that the transferors will not have the right to eject. The rent reserved is only nominal, i. e., 0-2-0 in the rupee. It is contended before us that these conditions appertain more or less to those which ordinarily appertain to an occupancy tenant under the Tenancy Act. The only exception, it is conceded, is that under the Act there is a right of re-entry inasmuch as if an occupancy tenant happens to fall in the arrears and a decree is obtained against him, he is liable to be ejected. Assuming that it is so, the matter of the right of entry itself is one which in very large measure determines the line of demarcation between the state of proprietorship and tenancy. The present transaction, therefore, in our opinion, is one of sale and not of a creation or conferment of occupancy rights. In other words this is a case of land pre-emptible under the Prior Purchase Act. On this question we find ourselves unable to agree with the conclusion arrived at by the lower appellate Court.

We would allow this appeal with costs, set aside the judgment and decree of the lower appellate Court and restore that of the first Court.

The money required to be deposited by the order of the trial Court has not been deposited and we are asked to grant some time. Two months are granted for the deposit of such sum as has to be deposited. In case of default the suit shall stand dismissed with costs.

Appellate Civil.

*Before Hon'ble Mr. Justice Janki Nath Wazir
and
Hon'ble Mr. Justice Masud Hasan.*

ALAM SHER KHAN AND ANOTHER }
MAKHAN AND OTHERS }

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AKBAR DIN AND OTHERS	}	(PLAINTIFFS)— APPELLANTS
NAWAB KHAN AND OTHERS		
YAR MOHAMMED AND OTHERS		
FAQIR KHAN AND OTHERS		
SHAHWALI KHAN AND OTHERS		
<i>Versus</i>		
HON'BLE JUDICIAL MINISTER—		(DEFENDANT)— RESPONDENT.

CIVIL 2ND APPEALS NOS. 233, 236, 239 AND 252
OF 2000 AND 38, 44, 143 OF 2001.

Land Alienation Act (V of 1995)—Sections 6 and 25—Determination of persons or classes of persons deemed to belong to agriculturist classes—Whether a suit for declaration that plaintiff belongs to the categories of classes included in the list of agriculturists is triable by a civil or revenue Court.

Held, that such a suit is cognizable by a civil Court and the Land Alienation Act does not create any bar. A suit for the declaration of a status as belonging to certain caste is such as would fall within the terms of section 9 of the Civil Procedure Code.

APPEALS FROM THE DECISION OF THE DISTRICT
JUDGE, POONCH, (CH. BHAGAT RAM) DATED 21st KATIK
2000.

MESSRS A. N. KAK, JIA LAL KILAM AND SATYAPAL.
ASSISTANT ADVOCATE GENERAL AND MR. SIAM LAL
KOUL.

Per Masud Hasan J.—This civil second appeal and second appeals Nos. 233, 239 and 252 of 2000 and 38, 44 and 143 of 2001 arise out of connected cases. They have been disposed of by the lower appellate Court by one judgment and deal with the same point of law. They will, therefore, be taken together and will be disposed of by this judgment.

These are plaintiffs' appeals and arise out of suits for declaration. The plaintiffs claim to be declared as belonging to the various castes as described in their respective plaints. The cause of action mentioned in these plaints is the preparation of certain lists by

the revenue officer under the Land Alienation Act wherein they classified certain castes and certain classes of people as agriculturists. The plaintiffs of these cases were from the year 1963 *i. e.*, from the first settlement, classed as belonging to castes which did not fall in the category of classes which were included in the lists. The suits were filed against the Judicial Minister. They were contested on merit and were so disposed of, in some cases in favour and in other cases against the plaintiffs. In appeal, for the first time, it was contended that the Civil Court had no jurisdiction to try these suits and this question assumed an importance before which every other issue that arose on the merits paled into insignificance. It was to that question that the lower appellate Court applied its mind and it was eventually on that question that the suits turned to the exclusion of the other questions. We have, therefore, in these connected appeals only to decide the question of jurisdiction.

The plea taken on behalf of the Judicial Minister in the lower appellate Court found favour with that Court and that Court held that the Civil Court had no jurisdiction to try the suits. The argument on behalf of the Government is that under section 6 of the Land Alienation Act it is the Council which by notification in the J. & K. Government Gazette has to "determine what persons or classes of persons in any district or group of districts are to be deemed to belong to agricultural classes for the purpose of this Act" and under section 25, the jurisdiction of the Civil Court is barred in respect of the matter and the manner of the exercise of the power so vested in the "Council or Revenue officer" under this Act. Section 25 may be re-produced here with profit. It is as follows :—

- " 25. (1) A Civil Court shall not have jurisdiction in any matter which the Council or Revenue officer is empowered to dispose of under this Act.
- (2) No Civil Court shall take cognizance of the manner in which the Council or any Revenue officer exercises any power vested in him by or under this Act."

It is contended that the preparation of these lists is a matter particularly entrusted to revenue officers under the Land Alienation Act and the plaintiffs by means of their suits desired to include themselves in the categories of classes which are determined in these lists. It is, therefore, urged that in terms of section 25 of the Land Alienation Act the suits are not cognizable by the Civil Court. It may be stated here that another objection was also taken on the ground that the cognizance of the suits would be barred by the provisions of section 139 of the Land Revenue Act. This argument was not accepted by the lower appellate Court and it has not been pressed before us. We need not revert to it any further.

The simple question therefore that we have to decide is: whether the cognizance of the suit is barred by the provisions of the Land Alienation Act. It would appear that the contention that has been detailed by us above is based on a fallacy which is not very difficult to fathom. The only thing to be seen is what is the "matter which the Council or Revenue officer is empowered to dispose of under this Act." In other words what is the Council required to do under section 6 of the Act. Without doing any violence to the phraseology of that section it may be stated at once that the Council has only to determine what "persons or classes of persons in a district or group of districts are to be deemed to belong to agricultural classes for the purposes of this Act." Do the plaintiffs of these cases impugn or protest against that action? The answer will obviously be found to be in the negative. They do not object to anything done by the Council, or the officers deputed by it, in the matter of determination of persons or classes of persons in any district or group of districts as falling under the denomination of agricultural classes. What they desire, as is evident from the prayer in the plaint, is a declaration that they also belong to one of the classes which are included in that list. In order to circumvent the implication of this reasoning, learned counsel sought recourse to section 30 of the Land Alienation Act whereby rules are contemplated to be made by the Council for "carrying into effect the purposes of this Act" and it is laid down that "In particular and without prejudice

to the generality of the foregoing power the Council may make rules prescribing the Revenue officers to whom applications may be made and the manner and form in which such applications shall be made and disposed of." Without proceeding to examine the rules at this stage it may at once be said that as far as the purpose of this Act is concerned it is no more than the preparation of the list to determine the classes in which the various groups of agriculturists fall and therefore the relief does not touch that purpose. Nor is the prayer in the plaint directed to "the manner and form" in which Revenue officers are required to dispose of application in this behalf. But it is argued that in terms of the rules made under the section by virtue of Standing Order No. 15 it would appear that the Revenue officers prescribed under section 30, have the power under rule 3 to take a certain course when certain applications are made for mutations in revenue papers. The particular clause on which reliance is placed is under rule 3 and is as follows :—

"The following instructions are issued on this subject :—

- (1) The most simple case that can occur is where a person applies to have his tribal or class designation as shown in the village papers altered, apart from any proceeding under the Alienation of Land Regulation, from that of a non-agricultural to an agricultural class. If a mutation of this kind is wrongly sanctioned, it may afterwards be used to support what would otherwise be an illegal transaction under the Alienation of Land Regulation. In such cases, therefore, the Revenue officer, to whom the register of mutations is submitted, should either, (a) refuse sanction and leave the applicant to appeal, or (b) if he thinks that there has been a mistake in fact, and that the claim should be admitted, report the case to the Wazir-Wazarat for orders."

In the first place it would be quite patent that

these are departmental instructions and cannot be clothed with the same sanctity as would be attached to rules made under section 30. Secondly, it may be mentioned that the purpose of the Act being clear as is stated above, the question of any procedure with regard to the correction or otherwise of mutations is a matter which would lie outside the purposes of the Land Alienation Act and to this extent the instructions will be *ultra vires*. In no case are the instructions in any way binding upon the Courts. It would appear that these instructions are only by way of illustration impressing upon the Revenue officers the possible situations in which particular care on their behalf is necessary at the time of dealing with certain mutations. We are, therefore, of the opinion that these instructions in the first instance do not touch the object of the suits and in the second place are not of such a character as may be accorded a binding force. The position, therefore, that emerges is that these suits do not affect the matter of the Land Alienation Act as detailed in the section, referred to above.

A suit for the declaration of a status as belonging to a certain caste is such as would fall within the terms of section 9 of the Civil Procedure Code. That section provides that suits of civil nature are cognizable by Civil Courts unless their cognizance is expressly or impliedly barred. We have seen that the Land Alienation Act does not create any bar. Both under the provisions of section 9 of the Civil Procedure Code as well as under section 42 of the Specific Relief Act the plaintiffs will be found entitled to pray for the declaration they seek.

To our mind, after a perusal of the judgment of the lower appellate Court, the confusion appears to arise from an inability to keep apart the question of the jurisdiction of the Court from the question of discretion in the exercise of that jurisdiction. It is one thing to say that a certain declaration on merits or on a consideration of the legal implications may not be given to a particular plaintiff and it is quite another thing to say that the Court has not the jurisdiction to decide that suit.

One other contention advanced before us may be disposed of. It deals with the question of the comparison of the phraseology used in the Jammu and Kashmir Land Alienation Act and that of the Punjab Land Alienation Act. It would appear that section 6 of the Jammu and Kashmir Land Alienation Act has been modeled on the provisions of section 4 of the Punjab Land Alienation Act. The only difference is that whereas in our Act the phraseology used is "persons or classes of persons," the words used in the Punjab Land Alienation Act are "bodies of persons." It is argued that because of the difference in that phraseology the term "persons" in our Act would also include 'individuals.' This argument need not detain us because on turning to the actual lists that were prepared under the provisions of section 6 it would be found that in those lists it is only persons or classes of persons that are determined and nowhere are individuals included and if we advert to the purposes of Land Alienation Act it would be quite manifest that it could not be contemplated that the Council would deal with individual cases.

Lastly we might make a passing reference to that portion of the judgment of the lower appellate Court in which it has brushed aside all the rulings of the Punjab High Court to the effect that suits of this kind are suits of a civil nature which would lie in Civil Court. These rulings were brushed aside on the ground that they were passed before the amendment in section 4 was made in the year 1938. That amendment in section 4 is included as sub-clause (2) and is as follows :—

" (2) If any question of doubt should arise as to whether a person is or is not a member of a notified agricultural tribe, the Deputy Commissioner shall after such enquiry as may be prescribed determine whether that person is to be deemed to be a member of the said agricultural tribe for the purposes of this Act.

(3) In passing an order under the above subsection the Deputy Commissioner shall

not be bound by any decree of a Civil Court, and may review any order previously passed under that sub-section :

Provided that nothing in this section shall affect a decree passed in a suit instituted before the 15th June 1938."

It is after this amendment that the jurisdiction of the Civil Court has been barred. This would go in favour of the argument advanced on behalf of the plaintiffs that there is nothing in our Act similarly barring, as is required by the provisions of section 9 of the Civil Procedure Code, the jurisdiction of the Civil Court.

In the result, therefore, these appeals are allowed with costs with the finding that the Civil Court has jurisdiction to try these suits. Because the suits have not been tried on merits, they will go back to the lower appellate Court with the direction that they will be disposed of in accordance with law.

Board of Judicial Advisers.

*Before the Hon'ble Chowdhary Niamat Ullah, President,
the Hon'ble Dr. Prosanto Kumār Sen,
and*

the Hon'ble Pt. Shiam Krishna Dar.

RAM RAKHA MAL CHOPRA

versus

PEOPLES BANK OF INDIA.

CIVIL APPEAL No. 5 OF 1945.

(I) *Civil Procedure Code (Act X of 1977)—Order XXIX, rule 1—Subscription and verification of pleading in suits by or against a Company—Principal Officer of the Company—Whether Assistant official liquidator is such officer. The law contemplates one or more "liquidators". A person described as Assistant Official Liquidator is in law a liquidator and as such entitled to sign and verify plaints on behalf of the Company in liquidation. The Company being in liquidation the director and officials of the Company are not functioning, and it is only the official liquidator who can*

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be considered to be the principal official within the meaning of Order XXIX rule 1.

(2) *Civil Procedure Code (Act X of 1977)—Section 13—Right of a foreigner to sue in State Courts—Where a foreign judgment is not conclusive, a suit in the State to enforce original liability is maintainable.*

A Company registered in British India is entitled to sue in the State Courts which cannot refuse to recognise its status as determined by the law in force in British India. The fact that the company is in liquidation does not in any way affect the defendant's liability. The order of a High Court in British India directing the contributories to pay what is due from them cannot be enforced in the State as it could be enforced in British India but the liquidator can bring a regular suit in the State to enforce the original liability incurred by the defendant when he purchased the shares.

APPEAL AGAINST THE ORDER* OF HIGH COURT OF JUDICATURE, DATED 5TH CHET 1999.

L. SATYA PAL VOHRA—For the Appellant.
PT. SHAMBU NATH DAR, ADVOCATE—For the Respondent.

The judgment of their Lordships was delivered by:—

Hon'ble Chowdhary Niamat Ullah.—The appellant was the sole defendant in the suit which was brought by the respondent, Peoples Bank of India Limited (in liquidation) which is a registered company with its head office at Lahore. He is a resident of a place within the territory of Jammu and Kashmir State. It appears that the defendant purchased 50 shares of the Peoples Bank of India and incurred a liability to pay up to 50 per cent. by instalments of Rs. 3 per share quarterly and the rest on call. He failed to pay the instalments and a suit was brought by the bank for payment of overdue instalments in the Court of Sub-Judge Jammu. That suit was decreed on 16th May 1933. On the bank going in liquidation the Lahore High Court called upon the contributories to pay such part of their liabilities as had remained undischarged and the defendant

*Reprinted as 2 J. & K. L. R. 44.

was called upon to pay Rs. 1,700. Being a State subject he did not submit to the jurisdiction of the Lahore High Court and the liquidator of the bank had to bring a regular suit in the Court of the Sub-Judge Jammu for the recovery of that amount. The suit was contested on various grounds only one of which is involved in the present appeal. It is argued that the liquidation proceedings taken before the Lahore High Court are not binding on the appellant and that the liquidator is not entitled to sue in the Court of the Subordinate Judge, Jammu.

This contention is based on a complete misapprehension of the present position of the bank. It cannot be denied that the Peoples Bank of India is a juristic person but being registered in British India it will be treated as a foreigner in the State Courts. It is, however, entitled to sue in such Courts like any other foreigner. The order of the High Court of Lahore directing the contributories to pay what is due from them is not being enforced as it could be enforced in British India. The liquidator has brought a regular suit to enforce the original liability incurred by the defendant-appellant when he purchased the shares. There can be no doubt that if such liability is valid and enforceable, which is not disputed, a suit is maintainable for recovery of the amount due from the defendant in a Court to whose jurisdiction he is subject. The fact that the bank is in liquidation does not in any way affect the defendant's liability. A company registered in British India is entitled to sue in the State Courts which cannot refuse to recognize its status as determined by the law in force in British India.

A subsidiary point was raised by the learned counsel for the appellant with reference to Order 29, rule 1, C. P. C. It was argued that Mr. Lakshmi Swarup who is described in the plaint as "Assistant Official Liquidator" was not entitled to bring the suit and verify the plaint. The contention is that he is not the principal officer of the bank and therefore not entitled to sign and verify the plaint. This contention has no force. Mr. Lakshmi Swarup is undoubtedly one of the liquidators though for administrative purposes his designation is Assistant

Official Liquidator. The law contemplates one or more "liquidators". A person described as Assistant Official Liquidator is in law a liquidator and as such entitled to sign and verify plaints on behalf of the bank in liquidation. It is said that he cannot be regarded as the principal officer of the bank. The bank being in liquidation the directors and the officials of the bank are not functioning and it is only the official liquidator who can be considered to be the principal official within the meaning of Order 29 rule 1, C. P. C.

In the circumstances already stated the Board are of opinion that the view taken by the learned Judges of the High Court is sound and that this appeal has no force. Accordingly they humbly advise His Highness to dismiss it with costs.

Board of Judicial Advisers.

*Before the Hon'ble Chowdhary Niamat Ullah, President,
the Hon'ble Dr. Prosanto Kumar Sen,
and
the Hon'ble Pt. Shiam Krishna Dar.*

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HASHAM ALI—APPELLANT

versus

MOHD. ALAM AND OTHERS—RESPONDENTS.

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CIVIL APPEAL NO. 29 OF 1945.

Right of Prior Purchase Act (II of 1903)—Plea of Waiver—Probabilities evenly balanced—Direct oral evidence—View of the trial judge not to be lightly disregarded.

The fact that no notice of the sale was given to the pre-emptor under section 18 of the Right of Prior Purchase Act, the possibility that the sale consideration was to a certain extent inflated and the fact that there is some indefiniteness in the oral evidence as to the time of offer and as to the terms which were offered to the pre-emptor when he refused the offer, lead to an inference against the consent. On the other hand, the fact that the appellant was present at the time when the extract from Jamabandi was taken from the patwari and made no protest and he was also present at the time of

mutation proceedings and he attested the mutation order without any protest coupled with the fact that he has brought the suit on the last day of limitation lead to an inference that at one time he had no objection to the sale or at least he did not care to assert his right. In a case in which the probabilities are so evenly balanced that direct oral evidence must of necessity turn the scale and in a matter of appreciation of oral evidence the view of the trial judge before whom the witnesses were examined and who had an opportunity to observe their demeanour, cannot be lightly disregarded.

In such a case it is not sufficient for the pre-emptor-appellant to show that there can be two opinions on the question of waiver but he has to show that the judgment in appeal is beyond doubt wrong and that the finding of the trial judge on the plea of waiver, which is based upon an appreciation of oral evidence and which has been affirmed by the High Court on a review of entire evidence, is manifestly incorrect.

APPEAL AGAINST THE DECREE OF THE HIGH COURT
OF JUDICATURE, DATED 20TH MAGHAR, 2001.

CH. INDER DASS—For the Appellant.

CH. HAMIDULLAH ADVOCATE—For the Respondent.

The judgment of their Lordships was delivered by :—

Hon'ble Pt. Shiam Krishna Dar.—This is an appeal against a judgment and decree of the High Court of Judicature, Jammu and Kashmir, dated *Maghar*, 20th, 2001 by which it reversed a judgment and decree dated the 4th *Sawan*, 2001, of the District Judge Mirpur, whereby a judgment and decree dated *Magh*, 29th, 2000, of the Munsiff of Mirpur was reversed.

On *Sawan* 18, 1999, respondents Nos. 1 and 2 executed a sale-deed of about 28 *kanals* of land situated in village Chhunja in favour of respondents Nos. 3 to 5 for an ostensible consideration of Rs. 2,690. Against this sale the appellant, who is a co-sharer and *Lambardar* of the village Chhunja and who is a

collateral of the vendees, raised an action under section 20 of the Right of Prior Purchase Act (II of 1933) to enforce his right of prior purchase.

¶ In the suit the controversy related to the question of the consideration of the sale and to the question whether the appellant by his declaration and by his conduct had consented to the sale and had waived the right of prior purchase. On a finding that the ostensible consideration was the actual consideration and that the appellant had consented to the sale and had waived his right of prior purchase, the trial judge dismissed the claim. On appeal the District Judge holding that the actual consideration of the sale was Rs. 2,690 and that the plea of waiver had not been established, decreed the claim. In the second appeal the High Court agreeing with the finding of the trial Court on the plea of waiver, dismissed the claim.

The evidence in regard to the plea of waiver is partly direct and partly circumstantial. At the trial one of the vendees and two witnesses called by the vendees deposed that before the sale in dispute, was concluded the appellant had the notice of the sale and at one stage the property was offered to him and he expressed his inability to purchase it. Evidence was also given to show that the vendor had taken the extract of *Jamabandi* of the property to be sold, from the *Patwari* with a view to file it with the sale-deed for registration, and the appellant was present at the time and made no protest and further evidence was given to show that the appellant was also present when mutation proceedings took place on the basis of the sale and he attested the mutation order without any protest.

The appellant on the other hand denied that he had consented to the sale or had any notice of it and he called three witnesses to prove that on the day of attestation of mutation he was lying ill and was forcibly called by the *Tehsildar* and made to attest the mutation.

Before the Board the evidence of the respondents was subjected to a severe criticism. It was contended

that their two witnesses who proved the consent of the appellant to the sale, had given an interested and perjured testimony, as admittedly the witnesses bear some relationship to the respondents and live in the same village with them and there exists some hostility between them and the appellant, as a result of some litigation in which they were interested from opposite sides. It was further contended that the presence of the appellant with the *Patwari* at the time when the extract from *Jamabandi* was taken, even if it be accepted as correct, was inconclusive and the reliable evidence in the case goes no further than this that the appellant attested the mutation order before the *Tehsildar* and this he had to do as a part of his official duty as a *Lambardar*, and as this attestation was made sometime after the sale it could not be taken as a consent of the sale. Lastly it was contended that the consideration of the sale, according to the finding of the District Judge, which had not been reversed by the High Court, had been inflated by a sum of Rs. 210; and the respondents' evidence, even if it be taken on its face value, does not show that the exact terms of the sale, and in particular the exact property which was to be sold, had been disclosed to the appellant when the alleged offer was made to him.

There are certain circumstances in this case which favour the contention of either side. The fact that no notice of the sale was given to the appellant under section 18 of the Right of Prior Purchase Act (II of 1993), the possibility that the sale consideration was to a certain extent inflated and the fact that there is some indefiniteness in the oral evidence as to the time of offer and as to the terms, which were offered to the appellant when he refused the offer, lead to an inference against the consent. On the other hand, the fact that the appellant was present at the time when the extract from *Jamabandi* was taken from the *Patwari* and made no protest and he was also present at the time of mutation proceedings and he attested the mutation order without any protest coupled with the fact that he has brought the suit on the last day of limitation lead to an inference that at one time he had no objection to the sale or at least he did not care to

assert his right. In a case in which the probabilities are so evenly balanced the direct oral evidence must of necessity turn the scale. And in a matter of appreciation of oral evidence that view of the trial Judge before whom the witnesses were examined and who had an opportunity to observe their demeanour, cannot be lightly disregarded.

In order to succeed in this appeal it is not sufficient for the appellant to show that there can be two opinions on the question of waiver but he has to show that the judgment in appeal is beyond doubt wrong; and that the finding of the trial Judge on the plea of waiver, which is based upon an appreciation of oral evidence and which has been affirmed by the High Court on a review of entire evidence, is manifestly incorrect. In the opinion of the Board the appellant has failed to discharge this burden.

The Board will accordingly advise His Highness that this appeal be dismissed with costs.

Board of Judicial Advisers.

*Before the Hon'ble Chowdhary Niamat Ullah, President,
the Hon'ble Dr. Prosanto Kumar Sen,
and
the Hon'ble Pt. Shiam Krishna Dar.*

1945

TH. BHIKAM SINGH—APPELLANT

June 30

versus

SURJAN SINGH AND OTHERS—RESPONDENTS.

2002

CIVIL APPEAL NO. 2 OF 1945.

Har 17

*Appeals to His Highness' Act (XVI of 1996)—
Section 2 (a)—“Cases in which appeal lies”—“final
order” explained.*

If the decision only in one way puts an end to the litigation, the order is not final. Unless the proceeding in which the order is passed is of such a nature that the order either way finally disposes of the matter in litigation, an order in such proceeding is not a final order. The order is not final unless it finally disposes of the rights of the parties in relation to the suit.

47 I. A. 124—A. I. R. 1920 P. C. 86 ; 60 I. A.
76—A. I. R. 1933 P. C. 58 ; (1891) I. Q. B. 34 ;
referred to.

APPEAL AGAINST THE ORDER OF THE HIGH COURT
OF JUDICATURE, DATED 16TH CHET 2000.

RAJA JASWANT SINGH—For the Appellant.
CH. INDER DASS—For the Respondents.

*The judgment of their Lordships was delivered
by :—*

Hon'ble Chowdhary Niamat Ullah.—The suit out of which this appeal arises was one for recovery of possession of certain property and for setting aside a perpetual lease under which the defendants claimed to be in possession. The trial Court decreed the suit. The defendants appealed to the District Judge and relied upon a compromise said to have been entered into shortly before the petition of appeal was lodged. The plaintiff repudiated the compromise alleging fraud and undue influence. The District Judge was, however, satisfied that the compromise relied upon by the defendants was lawful. Accordingly he passed the decree under Order 23 (3) Civil Procedure Code. The plaintiff appealed to the High Court re-iterating his allegation of fraud and undue influence. The question arose in the High Court as to whether the appeal before it was from a consent decree from which no appeal lies. The High Court treated the appeal as one from an order giving effect to a compromise which is subject to appeal. No question has been raised before the Board as regards this aspect of the case and the order of the High Court should, therefore, be treated as one passed in an appeal from an order. The defendant obtained from the High Court a certificate of leave to appeal to His Highness on the ground that the value of the subject matter of the suit and of this appeal is more than Rs. 2,500.

On the appeal coming up for hearing before the Board the learned counsel for the plaintiff-respondent took a preliminary objection that the order of the High Court from which the present appeal has been

preferred is not a final order within the meaning of section 2 (a) of the "Appeals to His Highness' Act," and that the certificate granted by the High Court should be cancelled.

The learned counsel on both sides exhaustively argued the question thus raised and referred to a number of decided cases bearing on the point. It is not necessary to refer to the earlier decisions of the British Indian High Courts, some of which are conflicting as the latest pronouncement of their Lordships of the Privy Council in *V. M. Abdul Rahman and others versus Qasim and Sons* (60 *Indian Appeals* page 76, S. C. A. I. R. 1933 P. C. page 58) furnishes a test, which, in the opinion of the Board, should be adopted for the disposal of the preliminary point. In laying down that test they followed an earlier decision of their own in *Ranchand Munjmal versus Ghowardhan Dass Vishnodass* (47 *Indian Appeals* page 124, S. C., 1920 P. C. page 86) which lays down the broad proposition that "An order is final if it finally disposes of the rights of the parties." The precise question involved in that case was whether an order of the High Court refusing stay of proceedings under section 19 of Indian Arbitration Act of 1899, and remanding the case for disposal on the merits was a final order within the meaning of section 109 (a) Civil Procedure Code which is identical in terms with section 2 (a) of "Appeals to His Highness' Act." Their Lordships adopted the view taken in the English case *Solomon v. Woolner* (1891) 1. Q. B. page 34) and another English case in which the same view had been taken. Therefore, to deduce the *ratio decidendi* adopted by the Privy Council one has to examine *Solomon v. Woolner* already referred to. It has been previously held in some earlier English decisions that if the order in the case is one which would result in final disposal of it, the order is none the less final if it is in the other way which results in a remand. The Lords of appeal in *Solomon v. Woolner* dissented from that course of decisions and laid down that "A final order is one made on such an application or proceeding that for whichever side the decision is given, it will, if it stands, finally determine the matter in litigation." It is to be observed that the earlier test, namely, that if the decision only in

one way puts an end to the litigation the order is final, is no longer the correct test and that unless the proceeding in which the order is passed is of such a nature that the order either way finally disposes of the matter in litigation an order in such proceeding is not a final order. It is possible to argue on the strength of this dictum that the "matter in litigation" is finally decided where the Court declares the compromise to be invalid and remands the suit for trial on merits, in as much as the "matter in litigation" was the controversy relating to the validity of a compromise which is finally set at rest, but their Lordships of the Privy Council have interpreted it to mean that the order is not final unless "it finally disposes of *the rights of the parties*" (see *Ramchand Munjumal v. Ghowardhan Dass Vishnoddass*, 47 *Indian Appeals* page 124, S. C. 1920 P. C. page 86). In *V. M. Abdul Rahman v. Qasim and Sons* (60 *Indian Appeals* page 76, S. C. A. I. R. 1933 P. C. page 58) Sir George Lowndes elaborated the rule thus:—"The finality must be a finality in relation to the suit. If after the order, the suit is still a live suit in which the rights of the parties have still to be determined; no appeal lies against it under section 109 (a) of the Code." It was further observed that "The enforcement of this principle involves no practical hardship, in as much as in a proper case it is always open to the appellate Court to give a special certificate under section 109 (c) [corresponding to section 2 (b) of "Appeals to His Highness' Act"]. In disposing of the argument based on earlier decisions of the British Indian High Courts it was remarked that "The decision in *Ramchand Munjumal's case* (47 *Indian Appeals* page 124, S. C. 1920 P. C. page 86) must have been either over-looked or misunderstood."

Applying the principle enunciated in the cases referred to above, it must be held that the order of the High Court, remanding the suit for trial on the merits, is not a final order, in that, the suit is a live one in which the rights of the parties have still to be determined. As was very aptly put by Sir George Rankin in *Surrender Nath Nitar v. Sh. Taru Bala Dassi* (A. I. R. 1929 Cal. page 357), "In my judgment the mere disposal of an application for recording an

adjustment coupled with an order that it is, therefore, necessary for the case to be tried in the ordinary way, does not stand in such a relation to the proceeding before the Court as to entitle it to be recorded as something which negatives one of the several ways in which it may be contended that the rights of the parties should be disposed of." Where it is alleged by one party that the suit has been adjusted by a compromise which is repudiated by the other who insist on the trial of the suit on the merits the real question between the parties is whether the suit ought to be disposed of on the finding of the Court based on the agreement of the parties contained in the compromise or on a finding to be arrived at after the examination of evidence in the case. The question is one relating to the method of disposal of the suit. In this view the order of remand directing the trial of the suit cannot be said to be a final order adjudicating upon the rights of the parties.

Besides the Calcutta case, already referred to, which is directly in point, other High Courts have taken the same view (see *Brecto v. Brecto*, A. I. R. 1924 Madras, page 701; *Satchitanand Vidya v. Vidya Narang* A. I. R. 1924 Bombay, page 383).

A careful consideration of the language of section 2 (a) of the "Appeals to His Highness' Act" and the decisions of their Lordships of the Privy Council, referred to above, the Board are of opinion that the order of the High Court appealed from is not a final order and no certificate of leave should have been granted by the High Court under section 2 (a) of "Appeals to His Highness' Act." As the question involved in the appeal is one of fact, pure and simple, the case is not one in which special leave could be granted by the High Court under section 2 (b) of "Appeals to His Highness' Act" or by this Board. In this view the Board are of opinion that the preliminary objection taken on behalf of the respondent should prevail. Accordingly they humbly advise His Highness to dismiss the appeal but make no order as to costs of this appeal since the objection taken by the respondent before the Board could have been but was not taken before the High Court.

Board of Judicial Advisers.

1945 *Before the Hon'ble Chowdhary Niamat Ullah, President,*
 the Hon'ble Dr. Prosanto Kumar Sen,
 and
 June 29 *the Hon'ble Pt. Shiam Krishna Dar.*

2002
 Har 16 **MULK RAJ AND OTHERS—APPELLANTS**
versus
CHUHRA—RESPONENT.

CIVIL APPEAL No. 6 OF 1945.

Consolidation of Holdings Act (XXII of 1996)—Section 22—Jurisdiction of Civil Court barred as regards matters arising under the Act—Section not applicable if wrongful trespass on the land is committed subsequent to consolidation and suit for ejectment is instituted.

When the consolidation of holdings has already been effected and possession is given to parties and any wrongful trespass on the land is committed thereafter, a suit for ejectment lies in a Civil Court and section 22 is not applicable. In such a case the plaintiff is not seeking to obtain a decision or order relating to consolidation of holdings which the Governor or any other officer referred to in the section is specially empowered by the Act to determine, decide or dispose of.

APPEAL AGAINST THE DECREE AND ORDER OF THE HIGH COURT OF JUDICATURE, DATED 19TH PHAGAN 1999.

PT. LOK NATH SHARMA,—For the Appellant.
CH. INDER DASS—For the Respondent.

The judgment of their Lordships was delivered by:—

Hon'ble Dr. Prosanto Kumar Sen.—This appeal arises out of a suit instituted by appellants Mulk Raj and others against the defendant Chuhra for possession of 33 kanals 4½ sarsais out of 66 kanals 1 marla of land comprised within *Khewat* No. 3, *Khata* No. 6, *Khasra* Nos. 81 and 161 in Baspur village Tehsil Ranbirsinghpura and mesne profits Rs. 118. The case of the plaintiffs was that the

above land was their property and that in the year 1993 Chuhra and one Hasham took forcible possession of it. The plaintiffs thereupon instituted proceedings for criminal trespass against them and both of them were convicted and fined. The possession, however, remained with Chuhra and Hasham. Thereafter the plaintiffs instituted proceedings in the Revenue Court for ejectment. Hasham admitted the claim of the plaintiffs for half the share out of 66 *kanals* and 1 *marla* of land but Chuhra contested for the remaining half. A decree for ejectment was passed against Chuhra. This decree was set aside by the Governor. On appeal by Chuhra the High Court held that no relation of landlord and tenant subsisted between the parties and on that ground the ejectment decree was set aside. Thus the half share of Hasham remained in possession of the plaintiffs. For the other half share, in possession of Chuhra the plaintiffs instituted the present suit. The defendant Chuhra pleaded in his written statement that he had never taken forcible possession of land and that it was his land from the time of his ancestors. There were certain subsidiary issues framed but the main issue was:—Whether the plaintiffs were the owners of the land in dispute, and had the defendant accompanied by Hasham taken forcible possession of it (in *kharif* 1993 and *Rabi* 1994). The trial Court went into the matter in detail and upon the evidence on record and particularly the statement of Ch. Abdul Rahman, Inspector of Consolidation of Holdings, held that the land under dispute was consolidated in 1992 to 1993 and the *Khasra* Nos. 81 and 161 came to the share of the plaintiffs. The mutation was attested on 8th *Maghar*, 1993, and the possession of the land was delivered to the plaintiffs. The trial Court also held that Chuhra defendant obtained possession by force afterwards. He further passed a decree in favour of the plaintiffs for possession and for mesne profits as prayed for. On appeal the District Judge of Jammu upheld the decree and recorded the following finding:—

“The land is situated in a village known as Baspur. In that village the plaintiffs were recorded as owners in the Revenue papers. In the year 1992-93, consolidation

of holdings took place in this village. The plaintiffs who were recorded as owners were given these two "Nos. *Khasras*" 81 and 161 in lieu of their previous holding. This was done by Ch. Abdul Rahman, Inspector of Consolidation of Holdings. The mutations regarding the consolidation were attested by the Tehsildar with the consent of the proprietors. The land in dispute was given to and entered in the name of the plaintiffs. So there is no doubt and the learned Sub-Judge has rightly held that the land belonged to the plaintiffs."

Then he also added :—

"The learned Advocate has produced *Khasra Girdawari*. From its perusal it is clear that the plaintiffs were in possession of the land prior to consolidation as well. Only one *khasra* No. 443 was in possession of Samundar father of Chuhra, and that too as a tenant. Therefore, this contention of Chuhra appellant is palpably false."

Chuhra then appealed to the High Court where he took the point that the suit in the Civil Court was barred under section 22 of the Consolidation of Holdings Act, and that it was only the officer contemplated under that Act who had to decide the matter. This point seems to have weighed with the learned Judges of the High Court who have accordingly held that the suit as at present brought is premature and not maintainable, and that the plaintiffs' remedy is only by way of recourse to the Consolidation of Holdings Act.

From what has been said above it is clear that the finding of fact of both the Courts below are definite that the consolidation of holdings under the Act in force at the time was concluded and that the Inspector of Consolidation of Holdings gave possession of the land to the plaintiffs on the 8th *Maghar*, 1993. The plaintiffs' title was, therefore, perfected on that date and it is difficult to see how the Consolidation Officer

could have anything to do with a case of clear trespass afterwards committed by the defendant Chuhra, as it has been held in the concurrent judgments of both the Courts below.

Section 22 of the Consolidation of Holdings Act, 1996, provides as follows :—

“ No Civil Court shall entertain any suit instituted, or application made, to obtain the decision or order in respect of any matter which the Governor or any officer is, by this Act empowered to determine, decide or dispose of.”

In the opinion of the Board this section has no application to the facts of the present case for the reason above indicated, namely, that the consolidation had already been effected and possession given to the plaintiffs. In bringing an action against Chuhra for his subsequent wrongful trespass on the land, the plaintiff was not seeking to obtain a decision or order relating to consolidation of holdings which the Governor or any other officer referred to in the section was specially empowered by the Act to determine, decide or dispose of. Moreover, it is doubtful whether the Consolidation of Holdings Act of 1996 could have any application to the consolidation in the present case which was effected in 1992-93, apparently, under the provisions of the Co-operative Societies Act of 1993 ; or it might even have been under the previous Act of 1970.

- The Board would, therefore, humbly advise His Highness to set aside the judgment of the High Court and to allow this appeal with costs and to re-instate the judgment and the decree of the lower Court.
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Board of Judicial Advisers.

1945 Before the Hon'ble Chowdhary Niamat Ullah, President
 the Hon'ble Dr. Prosanto Kumar Sen
 and
 the Hon'ble Pt. Shiam Krishna Dar.

June 14

2002

Har 1

MEMBERS OF THE DHARAMARTH COUNCIL—
 APPELLANTS

versus

KANSHI DAS PUJARI TEMPLE
 NARSINGHI, MAISUMA,

TRILOKI NATH MINOR SON OF PT.
 GOBIND LAL VAISHNAVI THROUGH
 PT. GOVIND LAL VAISHNAVI,
 MAISUMA.

BODH RAJ.

PUSHKAR NATH MINOR SON
 OF BISHAMBAR NATH NEHRU,
 CHUNDPURA.

BISHAMBAR NATH BAKHSHI
 SON OF SHAJA RAM BAKHSHI,
 CHUNDPURA.

—RESPOND-
 ENTS.

CIVIL APPEAL No. 26 OF 1944.

Dharamarth Council—its status and powers.

The Dharamarth Council is an administrative Council of charities which has been given the status of a "registered company under the Companies Act No. XI of 1977" by Order No. I of His Highness and in it the supervision and management of certain charities including "Sarkari temples" is vested by the said Order read with "Ain Dharmarth".

APPEAL AGAINST THE DECREE OF THE HIGH COURT
 OF JUDICATURE, DATED ASSUJ II, 2000.

PT. HIRDAY NATH DAR— For the Appellants.
MESSRS A. N. BHAN, S. N. DAR AND JANARDHAN
TENG—For the Respondents.

The judgment of their Lordships was delivered by:—

Hon'ble Pt. Shyam Krishna Dar.—This is an appeal against the judgment and decree of the High Court of Judicature, Jammu and Kashmir, dated *Assuj* 11, 2000, by which it affirmed the judgment and decree of the Senior Subordinate Judge, Kashmir, dated 29th *Katik*, 1999.

There exists at Maisuma in the city of Srinagar a Hindu temple named after Narsinghji Maharaj; and in the Revenue records of Maisuma and Shankarpur some *Muafi* land has been recorded in the name of the said temple and over a portion of the said *Muafi* land at Maisuma stand seven houses. Under two counterpart of leases dated *Magh* 12, 1990, executed by respondents No. 2 to 4 and respondent No. 5, respectively and under a counterpart of lease dated *Chet* 2, 1990, executed by respondent 5, the respondents were put in possession of some portions of the above *Muafi* land situated at Maisuma, by *Bawa* Ram Prasad, the *Mahant* and *Pujari* for the time being of the said temple, for a period of 40 years. *Bawa* Ram Prasad died in the year 1992 and was succeeded by his disciple the respondent No. 1—who is the present *Mahant* and *Pujari* of the above-named temple. In the year 1998, respondent No. 1 also by his own authority leased out some houses mentioned above which stand on the *Muafi* land at Maisuma.

The appellants are members of an administrative Council of charities which has been given the status of a "registered company under the Companies Act No. XI of 1977" by the order No. I of His Highness and in which the supervision and management of certain charities including "*Sarkari* temples" is vested by the said order read with "*Ain Dharamarth*". Alleging that the supervision and management of the said temple and of its endowment has been vested in the appellants and that *Bawa* Ram Prasad and his

successor the respondent No. 1 had made unauthorised leases and the respondents were wrongly denying the appellants' rights of management, the appellants raised an action in the Court of the Senior Subordinate Judge, Srinagar, for a declaration that the said transfer made by Ram Prasad were not binding upon them and for an injunction restraining the respondents from interfering with the appellants' right of management of the above temple and its property.

The trial Judge finding that the *Muafi* lands mentioned above, including the leased property, were dedicated to the said temple but the dedication was made by Ram Prasad himself and the said temple was not a "*Sarkari*" temple and the appellants had no right of management and supervision in it, dismissed the claim. In appeal in the High Court, Ganga Nath C. J. and Wazir J. by separate judgments in substance accepted the view of the trial Judge; but Masud Hasan J. dissented holding that the dedication was made not by Ram Prasad, but had existed from before and that the appellants had a right of supervision and management in it.

The controversy in this appeal before the Board has covered a large ground. It related to the question whether the said *Muafi* lands including the leased property were secular or were endowed and if endowed, whether the endowment was in favour of the temple or in favour of Ram Prasad and his predecessors personally, and whether the endowment was made for the first time by Ram Prasad or it had been in existence from before and continued afterwards and lastly, whether the said temple was a State endowed, State managed "*Sarkari* temple" and the appellants had any power of supervision or management in it and its endowment.

In the "List of temples etc., in Jammu and Kashmir Provinces" printed and published under the authority of the Dharmarth Department, the temple of Sri Narsinghji Maharaj at Maisuma is shown to be an old temple and in the First settlement proceedings, in an order of the Settlement Officer dated 4th March, 1935 A. D., the property recorded in the name of

Ram Prasad was described as "an old *Muafi* and pertains to Sri Narsinghji." There is also other evidence on the record to determine the controversy whether the endowment was in favour of *Bawa* Ram Prasad or his predecessors personally or whether it was in their name on behalf of the temple and also to determine the controversy whether the endowment was founded by *Bawa* Ram Prasad or whether it had existed from before and it was merely accepted and acknowledged by him. There is also sufficient evidence to determine the controversy whether or not the appellants exercised supervision and management of the temple and its endowment after the death of Ram Prasad and during the tenure in office of the respondent No. 1.

But such evidence as exists with regard to the appellants' authority to supervise and manage the institution and its endowments during the time of Ram Prasad, is involved in controversy. Part of this evidence consists of documents which were produced in the trial Court and formed part of the record but were not duly proved; part of this evidence consists of documents which were produced in appeal in the High Court by an application dated 24th *Baisakh*, 2000 and presented on 28th *Baisakh*, 2000 under Order 41 rule 27 of the Civil Procedure Code. These documents produced in the High Court are part of a file No. 95 of the Dharamarth Department and some of them are official documents and some are applications and statements which, unless admitted, may require formal proof. A notice to show cause against the application for admission of fresh evidence mentioned above was served on the respondents, but the proceedings of the High Court do not show any written objection of the respondents; nor do they contain any order of the High Court disposing of the application one way or the other.

In the appeal before the Board one matter of controversy was whether the appellants should be given an opportunity to prove and exhibit the aforesaid documents. In this suit relief is claimed not only against respondent No. 1, the present *Mahant* and Manager, for his making leases on his own authority without reference to the appellants and for

denying the appellants' rights and for interfering with their management, but relief is also claimed against respondents No. 2 to 5, the lessees of Ram Prasad, the former *Mahant* for acts done by the last *Mahant* and Manager. The appellants allege that the respondent No. 1 was appointed the Manager and *Pujari* of the temple by them and he at least is estopped from denying their authority; they further allege that Ram Prasad, the predecessor of respondent No. 1 had also submitted to their supervision and management and there is a file No. 95 of the Dharmarth Department which was produced in the High Court in appeal which contains documents proving this fact and this file and these documents relating to this file they could not with due diligence discover and produced at the trial.

Be that as it may, in the opinion of the Board it will not be satisfactory to decide the question of the appellants' authority to manage and supervise the institution and its endowments on the basis of evidence relating to the period after the death of Ram Prasad alone and it will be more satisfactory to determine the controversy on the evidence which relates to the period of Ram Prasad also. The Board, therefore, is of opinion that an opportunity should be granted to the appellants to prove and exhibit the documents which remained unproved in the trial Court and in the High Court with liberty to the respondents to produce rebutting evidence and on the evidence thus brought on the record the entire controversy may be considered and determined afresh by the High Court. But as the appellants are to blame for the necessity of the fresh trial of the controversy they must pay all costs upto this stage of proceedings.

The Board will, therefore, humbly advise His Highness that this appeal be allowed and the decree of the High Court be set aside and the High Court be directed to restore its appeal to its original number and after giving an opportunity to parties to produce the evidence in the manner indicated above, the entire controversy between the parties may be determined afresh. The appellants shall pay costs upto this stage of proceedings; future costs will be in the discretion of the High Court.

Board of Judicial Advisers.

*Before the Hon'ble Chowdhary Niamat Ullah, President,
the Hon'ble Mr. Prosanto Kumar Sen
and
the Hon'ble Pt. Shiam Krishna Dar.*

1945

June 7

2002

Jeth 26

MAHANT BHOLA GIR—APPELLANT

versus

AMAR GIR—RESPONDENT.

CIVIL APPEAL NO. 18 OF 1944.

Plaint—Claim set out in the plaint not made out—No finding without proper pleadings and without proper investigation.

When a plaintiff cannot make out the claim set out in the plaint, the suit must fail.

It will not be proper to arrive at a finding without proper pleadings and without proper investigation.

APPEAL AGAINST THE DECREE AND *ORDER OF THE HIGH COURT OF JUDICATURE, DATED 24TH MAGH, 1999.

PT. AMAR NATH KAK AND PT. SHAMBU NATH DAR
—For the Appellant.

RAJA JASWANT SINGH, ADVOCATE—For the Respondent.

The judgment of their Lordships was delivered by:—

Hon'ble Pt. Shiam Krishna Dar.—The question in this appeal relates to the succession to the office of the *Mahant* of a Hindu temple and shrine called *Mandir Thakurdwara Smad Bawa Sobha Gir Maharaj*, situated in the town of Mirpur in Jammu and Kashmir State. The origin of the institution is involved in some obscurity but it derives its name from Sobha Gir who was its first known *Mahant*. Sobha Gir, before his accession to the *Mahantship*

*Reported as J. and K. L. R. 446.

of Mirpur, was a junior disciple of a religious institution called *Thakurdwara* Sanglawala situated at Dinga in the district of Gujrat in British India. The last undisputed *Mahant* of the institution at Mirpur, was Omkar Gir who was also a junior disciple of the institution at Dinga and he died in the year 1933 A. D. Since then the succession to the office of the *Mahant* of the institution at Mirpur has been in dispute. The respondent, who was defendant in the suit, has also taken holy orders but he is unconnected with the institution either at Mirpur or at Dinga. He claims title to the office on the ground that he was elected by the suffrage of the mohalla people at Mirpur. The appellant, who was plaintiff in the suit is the present *Mahant* of the institution at Dinga and he claims title on the ground that the institution at Mirpur is a branch of and subordinate to the institution at Dinga and that the *Mahant* at Dinga for the time being has an absolute right to nominate a successor to *Mahant* at Mirpur and further on the ground that the appellant was a co-disciple of the last *Mahant* of the institution at Mirpur.

The trial Judge holding that the Mirpur institution was a branch of and subordinate to the Dinga institution and that the appellant, as the present *Mahant* of the Dinga institution, had an absolute right to nominate a successor to the office of the *Mahant* at Mirpur and that the appellant, as a co-disciple of Omkar Gir, was also entitled to succeed, decreed the claim. On appeal the High Court holding that it is not proved that the Mirpur institution was subordinate to the Dinga institution or that the Dinga *Mahant* had a right to nominate a successor to the Mirpur *Mahant* and further holding that "according to the uniform practice the appointment of *Mahant* at Mirpur was always effected with the suffrage of the people of Mirpur and with the approval of the Revenue authorities of the State," dismissed the claim.

The facts of the case up to a certain stage are not open to any serious challenge. Sobha Gir, the first known *Mahant* of the Mirpur institution, was succeeded not by his disciple Daulatgir but by his co-disciple Bairogir. Thereafter the office of the *Mahant* of the institution at Mirpur passed from

teacher to disciple for four generations. Bairogir was succeeded by his disciple Lehergir and the latter was succeeded by his disciple Sumergir who in his turn was succeeded by his disciple Purangir who was a person of immoral character and he was expelled from the office of the *Mahant* as a result of the joint action of Gian Gir the *Mahant* of the time of the institution at Dinga and of the public and Revenue authorities of Mirpur and as a further result of their joint action Omkar Gir, the junior disciple of *Mahant* Gian Gir and a co-disciple of the appellant, was installed as a *Mahant* at Mirpur. Omkar Gir had a somewhat stormy career, he was externed for a time by the State authorities and during the time of his externment the institution at Mirpur was managed by one Narbadagir. Omkar Gir died in 1933 A. D., and Narbadagir died in 1935 A. D., and since his death the succession has been in dispute; and during the dispute the respondent succeeded in securing possession of the institution at Mirpur with the support of a section of Mirpur public.

It is a matter of some controversy whether Narbadagir was a only constituted *Mahant* or was only a mere manager or *pujari* of the Mirpur institution. There is no reliable evidence that Narbada Gir was ever duly nominated or elected or installed as a *Mahant*; and the reliable evidence in the case only shows that at first he acted as a deputy of Omkar Gir during his externment and later on continued to act as manager and as a *pujari* because the lawful disciple of Omkar Gir either did not appear on the scene or did not care to assert his right. At best Narbadagir could only be a *de facto Mahant*, and his tenure of office cannot affect the course of succession to the institution.

Beyond doubt there exists a spiritual and religious connection and also a connection of spiritual lineage between the Dinga institution and the Mirpur institution. The first and the second and the sixth *Mahants* of the Mirpur institution were the junior disciples of the Dinga institution. The first *Mahant* left a disciple of his own but he was succeeded not by his disciple but by his co-disciple of the Dinga institution. And when the fifth *Mahant* was expelled, as a result

of the joint action of the Dinga *Mahant* and of the public and of revenue authorities of Mirpur, a junior disciple of the Dinga institution and the co-disciple of the appellant was made *Mahant* of the Mirpur institution. But it is also a fact that the second *Mahant* was succeeded by his own disciple who became the third *Mahant* and the latter was succeeded by his own disciple who became the fourth *Mahant* and the latter again was succeeded by his own disciple who became the fifth *Mahant*.

The circumstances in which these successions took place are somewhat obscure and are a matter of conflicting testimony. The appellant's evidence is that the Mirpur institution is a branch or subordinate institution and the successor to each *Mahant* at Mirpur was appointed by the Dinga *Mahant* for the time being. The respondent's evidence, on the other hand, is that the successors to the Mirpur *Mahants* were the disciples of the previous *Mahants* and they were elected by the suffrage of the people. It cannot be disputed that the two institutions are independent so far that each has a separate *Mahant* of its own. It cannot also be disputed that out of five successions which took place since the death of Sobhagir three were from the teacher to the disciple and one was in favour of a co-disciple of the previous *Mahant* and only one succession *viz.*, the last, was in favour of a disciple of the Dinga institution who was personally and directly not connected with the Mirpur institution. It is possible that Dinga *Mahants* may have some voice or may have some authority in the appointment of the Mirpur *Mahant* generally or in certain circumstances about which the Board expresses no opinion but in view of the course of succession, mentioned above, it is not possible to hold that the Dinga *Mahants* have got an absolute and unconditional authority to appoint a successor to the office of the Mirpur *Mahant*, or to take possession of the institution of Mirpur, on the death of the Mirpur *Mahant* for the time being.

The appellant stated in his plaint, which is a fact that he was a co-disciple of Omkar Gir the last *Mahant*. But he did not state in the plaint that this relationship according to the usage of Mirpur institution gave

him a right of succession or a right to any relief. And no relief having been claimed on that basis the matter was not made the subject of any issue or of any proper investigation. And though it is true that the trial Judge in granting the relief, claimed by the appellant, has also relied in part upon this relationship; in the absence of proper pleadings and proper investigation it is not possible to consider the appellant's rights on the basis of this relationship and to grant him any relief.

The respondent pleaded that "After the death of Sobha Gir, the managers were appointed by the consent of the *Mohalla* people, out of the *Sadhus* who came here for worship, and the so-appointed manager was also entered in the revenue papers as such on the recommendation of the *Mohalla* people. The so-appointed manager received the *muafis*, *mukarraris* and rents from tenants." The High Court, in a passage already quoted has given a qualified approval to this plea and in another passage has expressed the view that "all the indications obtaining point out to the inference that succession in relation to this *Thakurdwara* was guided by the suffrage of the people interested in the *Thakurdwara* or with the approval of the Revenue authorities of the State." Except in one instance when Purangir was expelled and Omkar Gir was installed as a result of the joint action of Gian Gir, the Revenue authorities and a section of the public of Mirpur, there is no reliable evidence in support of the plea of the respondent or of the finding of the High Court. And the course of succession in the Mirpur institution, mentioned above, does not lend support to the contention that the succession to the office of the *Mahant* of the Mirpur institution by custom and usage depends upon the suffrage of the people of Mirpur generally or of the people of any *Mohalla* in particular and of the Revenue authorities of Mirpur.

Relying upon the course of succession as it has emerged in the evidence in the case, it has been contended by the appellant that the course of succession to the office of *Mahant* in the Mirpur institution shows that it was from teacher to disciple or to a co-disciple and this shows that the institution partakes of the

nature of a "*Mauroosi Muth*" in which the succession goes from *Guru* to *Chella* and in the event of a *Mahant* dying without leaving a *Chella* the succession devolves upon a co-disciple which the appellant in fact is of the deceased *Mahant*. It is further contended that whatever may be the limitations on the power of a *Dinga Mahant* in a case where a *Mirpur Mahant* dies leaving a *Chella* no such limitation exists when a *Mirpur Mahant* dies without leaving a *Chella* and in such an event the *Dinga Mahant* by virtue of his being the *Mahant* of the parent institution, have got a right to nominate the successor to the *Mirpur Mahant* and reliance was placed in support of this contention on the succession of *Bairogir* who succeeded as co-disciple to *Sobhagir* and on the succession of *Omkar Gir* who succeeded *Puran Gir* as junior disciple of *Dinga* institution.

It is possible that there may be some substance in these contentions, and they may form the subject-matter of a fresh suit in which it may be possible to give effect to them. This is a matter about which the Board does not express any opinion but it is not possible to give effect to these contentions in this suit because they raise a new case which was not properly pleaded and considered by Courts below. In the plaint and in the evidence produced by the appellant the independent existence of the *Mirpur* institution was denied and it was claimed that the *Dinga Mahants* had absolute right to appoint successors to *Mirpur Mahants* or to take possession of the *Mirpur* institution on the death of the *Mahant* of *Mirpur*. In the plaint and in the evidence led by him it was not claimed by the appellant that the *Mirpur* institution partook of the nature of a "*Mauroosi Muth*" or by custom and usage the succession proceeded from *Guru* to *Chella* or that a co-disciple succeeds under usage and custom to the office of *Mirpur Mahant* in the event of his dying without leaving a *Chella* or that a *Dinga Mahant* has a limited right of nomination in the event of *Mirpur Mahant* dying without leaving a *Chella*. It would not be proper to arrive at a finding on these matters on such evidence as now appears on the record without proper pleadings and without proper investigation. Further it is not disputed that one person cannot hold office both at

Mirpur and at Dinga and the appellant being a *Mahant* in office at Dinga shall have to surrender his rights to one of his disciples in order to make him the *Mahant* of the Mirpur institution. Indeed at one stage of litigation a disciple of the appellant was also a plaintiff in the suit but at an early stage he has gone out of the suit and his rights if any were not and cannot now be considered in this litigation.

It is true that as a result of the finding of the Board neither the appellant nor the respondent makes out a valid title and the appellant fails because he cannot make out the claim set out in the plaint, namely, that as a *Mahant* of the Dinga institution he has got an absolute right to take possession of the institution on the death of a Mirpur *Mahant*. But it does not follow that under the custom and usage prevailing in the Mirpur institution a lawful successor does not exist or cannot be found to the office of the *Mahant*. But if unfortunately such a situation has come into existence, section 92 of the Civil Procedure Code, in the opinion of the Board, points the appropriate procedure which might be resorted to in order to legalise the management and the administration of the institution.

The Board will humbly advise His Highness that this appeal be dismissed with costs.

Board of Judicial Advisers.

*Before the Hon'ble Chowdhary Niamat Ullah, President,
the Hon'ble Dr. Prosanto Kumar Sen,*

and

the Hon'ble Pt. Shiam Krishna Dar.

1945

ISMAIL PAREY AND OTHERS—APPELLANTS

May 25

versus

MST. RAHTI—RESPONDENT.

2002

CIVIL APPEAL NO. 16 OF 1945.

Jeth 1

Civil Procedure Code (Act X of 1977)—Sections 100 and 101—Second Appeal—Concurrent findings of first two Courts on a question of fact—Conclusive in second appeal.

The concurrent findings of the first two Courts on a question of fact is conclusive in second appeal to the High Court who has no power to interfere with it.

APPEAL AGAINST THE DECREE AND ORDER OF THE
HIGH COURT OF JUDICATURE, DATED 11TH JETH 2001.

PT. SHAMBU NATH DAR—For the Appellants.

PT. SARWANAND KAUL—For the Respondent.

The judgment of their Lordships was delivered by :—

Hon'ble Chowdhary Niamat Ullah.—Ismail Parey the son and *Mst.* Faizi the widow of one Jamal Parey, the appellants, were plaintiffs in the suit which has given rise to this appeal. They claimed partition of a house and a piece of land on the allegation that a $\frac{2}{3}$ rd share belonged to them as representing the interest of Jamal. The contesting defendant *Mst.* Rahti is the sister of Jamal Parey. Her defence was that the plaintiffs had no interest in the property in suit as their predecessor-in-interest Jamal Parey had transferred his rights by a sale-deed dated 6th *Poh*, 1982 to his son-in-law, Aziz Joo. The plaintiffs' reply was that the aforesaid sale-deed was a fictitious document and no title passed there-under. The Munsiff who originally tried the suit upheld the plaintiffs' allegation that the sale-deed was fictitious. This finding was up-held by the Subordinate Judge on appeal by the defendant. On the latter's second appeal to the High Court the decrees of the first two Courts were reversed and the plaintiffs' suit dismissed on the ground that the interest of Jamal the plaintiffs' predecessor, having been effectively conveyed by the sale-deed of 6th *Poh*, 1982, the plaintiffs have no right left which they can enforce by partition of the property in dispute. In arriving at this finding the learned Judges of the High Court have not considered the question whether the sale-deed was fictitious as alleged by the plaintiffs. What seems to have influenced the learned Judges is the existence of an agreement of sale-deed dated 1st *Poh*, 1998, executed by the vendee Aziz Joo in favour of the plaintiffs Ismail Parey and Khizir Rishi the husband of *Mst.* Rahti. The High Court would have been undoubtedly right in the view that if the sale-deed represented a genuine transaction under which title passed, a mere agreement by the vendee to sell would not affect his title under the sale-deed; but in view of the finding of the first two

Courts, (namely, that the sale-deed was fictitious and the transaction of sale evidenced thereby was sham the title remained with the so-called vendor, Jamal Parey, the plaintiffs' predecessor) there is nothing to prevent them from claiming partition of the share which descended to them on his death. The question as to whether the sale-deed dated 6th *Poh*, 1982 represented a sham transaction is obviously one of fact and the concurrent finding of the first two Courts was conclusive in second appeal to the High Court, who, therefore, had no power to interfere with it. It is possible for the Board to dispose of the case on this short ground, but as they have been taken through the entire evidence they prefer to deal with the case on the merits.

The property in dispute originally belonged to one Rustam Parey who died leaving three sons including Jamal Parey and a daughter *Mst. Rahti* the defendant-respondent. According to *Mcham-medan Law*, the share of each son was $2/7$ and that of the daughter $1/7$ in the property left by him. Rustam Parey had left, besides the two properties in dispute, some other properties. The other two sons of Rustam Parey were indebted to certain creditors who had obtained decrees against them and were threatening to have their interest in their father's properties sold in execution. The plaintiffs' case is that Jamal Parey who has since died and is now represented by his son Ismail Parey and his widow *Mst. Faizi* (the plaintiffs) apprehended that the creditors of his brother might possibly jeopardize his interest and executed the sale-deed dated 1st *Assuj*, 1998 in favour of his son-in-law Aziz Joo with a view to safe-guarding his own interest but not intending to transfer his rights in the properties left by Rustam Parey. According to the plaintiffs the sham sale-deed did not divest Jamal Parey of his rights. It appears that the interest of his two brothers in the ancestral property namely, $4/7$ was sold at the instance of the creditors and the purchasers, apparently, with the tacit consent of the other heirs, took possession of certain properties in their entirety leaving the properties in dispute as representing the share of Jamal Parey and *Mst. Rahti* the defendant. Thus the share of Jamal Parey became $3/7$ and that

of *Mst. Bahti* $\frac{1}{3}$ rd in the remaining properties, which are now in question, instead of $\frac{2}{7}$ and $\frac{1}{7}$ respectively in all the properties left by Rustam Parey. The sale-deed dated 6th *Poh*, 1982 related to a share of $\frac{2}{7}$ in all the properties left by Rustam Parey but it is not in dispute that it operates if at all upon the substituted $\frac{2}{3}$ rd share of Jamal Parey in the properties now in dispute.

As already stated the sale-deed was in favour of Aziz Joo Siraj and subsequently an agreement of sale dated 1st *Poh*, 1988 was executed by the vendée Aziz Joo in favour of Ismail Parey plaintiff No. 1 the son of the original vendor and Khizir Rishi the husband of *Mst. Rahti*. The agreement was one for a consideration of Rs. 800 of which Rs. 300 was alleged to have been paid. Aziz Joo Siraj died and his son Ghulam Nabi instituted a suit for specific performance of the contract of sale claiming the balance of the price, namely Rs. 500. The original agreement was not forthcoming and the claim was based on a copy. The defendants in that suit were Ismail Parey plaintiff No. 1 and *Mst. Rahti* defendant No. 1. The latter pleaded that Aziz Joo Siraj had no interest in the property which he could sell under the alleged agreement dated 1st *Poh*, 1988 and that the suit had been brought in collusion with Ismail Parey who was the brother-in-law of the plaintiff of that suit. The Court definitely held that Aziz Joo Siraj acquired no right in the property which he could sell and that the sale-deed dated 6th *Poh*, 1982 had been executed by Jamal Parey in favour of his own son-in-law to ward off the possible claim of the creditors of his brothers. On that finding the suit for recovery of the agreed price was dismissed. In the present litigation Ghulam Nabi, the then plaintiff and the son of the so-called vendee Aziz Joo Siraj, has given evidence to the effect that the sale-deed in favour of his father was fictitious and was never acted upon. *Mst. Rahti* is now alleging what she had repudiated in the previous litigation. The pleadings and the judgment in the earlier case have been produced in the present litigation. It is not necessary to consider the question as to whether the defendant's plea is barred by *res judicata* or estoppel. She does not claim Jamal Parey's $\frac{2}{3}$ rd share in her own right. At

best her plea is one of *jus tertii* based as it is upon the title of Aziz Joo Siraj said to be derived from the sale-deed by Jamal. The evidence already referred to leaves no doubt that the aforesaid sale-deed presented a fictitious transaction under which title did not pass from the vendor to the vendee with the result that Jamal remained the owner of his $\frac{2}{3}$ rd share which devolved on the plaintiffs after his death. In these circumstances it is not possible to support the plea in defence. The finding of the first two Courts, though not as full as it might have been, is based on good evidence and was conclusive in second appeal.

In this view the Board humbly advise His Highness to allow the appeal, set aside the decree of the High Court and restore that of the Subordinate Judge and to direct the respondents to pay the costs of the plaintiffs in all Courts.

Board of Judicial Advisers.

*Before the Hon'ble Chowdhary Niamat Ullah, President,
the Hon'ble Dr. Prosanto Kumar Sen*

1945

and

the Hon'ble Pt. Shiam Krishna Dar.

June 29

STAR DAR—PETITIONER

2002

versus

STATE—OPPOSITE-PARTY.

Har 16

APPLICATION FOR SPECIAL LEAVE TO APPEAL
(CRIMINAL) No. 2 OF 1945.

*Appeals to His Highness' Act (XVI of 1996)—
Section 10—Appeal in Criminal cases—Certificate to
be granted if case is arguable—Not necessary that a
question of law is involved in the case.*

*Section 10 of the Appeals to His Highness' Act
which gives a right of appeal to a prisoner sentenced to
death or imprisonment for life does not lay down
expressly or by implication that in granting a certifi-
cate the High Court should find that a question of law is
involved. A certificate should be granted if the case is
arguable, it may be as on a question of fact or law. In
some cases the question of an appropriate sentence may*

be an arguable one and it is desirable that even in such cases certificate should not be withheld.

Faiz Alam Vs. State 2 J. & K. L. R. 149 referred to and quoted.

APPLICATION FOR SPECIAL LEAVE TO APPEAL AGAINST THE ORDER OF THE HIGH COURT OF JUDICATURE, DATED 10TH MAGH 2001.

NEMO—For the Petitioner.

L. SUNDER LAL, 2ND ASSISTANT TO ADVOCATE GENERAL—For the State.

The judgment of their Lordships was delivered by :—

Hon'ble Chowdhary Niamat Ullah.—This is an application for special leave to appeal by one Star Dar who has been sentenced to death, for causing the death of one Mohd. Khan, and to certain minor punishment under section 395 R. P. C. The petition has been submitted from jail and the prisoner is not represented by a counsel. The Board have examined the record for themselves and find that the High Court refused leave to appeal on the ground that no "law point" is involved in the appeal. The attention of the learned Judges does not appear to have been drawn to the pronouncement of the Board in *Faiz Alam Alias Faiz V. State*, J. & K. Law Reports, Vol. II, page 149. In particular the following observation occurring in that pronouncement may with advantage be repeated :—

"It is clear, however, that in dealing with an application for the certificate, the High Court cannot be expected to set up for itself the standard set for the Privy Council. The High Court cannot say against its own judgment that there is some violation of the principles of natural justice or substantial or grave injustice has been done. In view of the provisions that a certificate is required from the Court which affirms the conviction, it seems to the Board that ordinarily the

High Court would not refuse such certificate in an arguable case for it can only do so by relying on the merits of its own judgment."

Section 10 of the Appeals to His Highness' Act, which gives a right of appeal to a prisoner sentenced to death or imprisonment for life does not lay down expressly or by implication that in granting a certificate the High Court should find that a question of law is involved. As pointed out by the Board in the case, already referred to, a certificate should be granted if the case is arguable, it may be as on a question of fact or law. In some cases the question of an appropriate sentence may be an arguable one and it is desirable that even in such cases certificate should not be with-held.

Having examined the record of the case the Board have arrived at the conclusion that the case is one in which a special leave to appeal ought to be granted. They humbly advise His Highness accordingly.

Board of Judicial Advisers.

*Before the Hon'ble Chowdhary Niamat Ullah, President,
the Hon'ble Dr. Prosanto Kumar Sen,
and
the Hon'ble Pt. Shiam Krishna Dar.*

1945

June 29

**REHMAN JOO AND OTHERS
versus
MST. SHALA.**

2002

Har 16

CIVIL APPEAL NO. 4 OF 1945.

Mohammedan Law—Co-heirs debt—Decree against one only—If binds the non-party heir—Execution of such decree—Right of non-party heir to his share of the property sold in execution.

A decree obtained against some only of the heirs for the debt due from deceased is not binding on the others so that in spite of a sale in execution of such decree the latter can recover their share of the property sold in execution of the decree. I. L. R. 7 All. 822, I. L. R. 7 All. 716, I. L. R. 23 All. 263, I. L. R. 58 All.

594, ('31) A. O. 253, (1935) 10 Luck., 433 I. L. R. 43 Bomb. 412, I. L. R. 43 B. 575, I. L. R. 40 Mad. 243 referred to.

APPEAL AGAINST *THE DECREE AND ORDER OF THE HIGH COURT OF JUDICATURE, DATED 30TH MAR 2000.

CH.INDER DASS—For the Appellant.

L. SATYAPAL VOHRA—For the Respondent.

The judgment of their Lordships was delivered by:—

Hon'ble Chowdhary Niamat Ullah.—This appeal by the defendant has arisen out of a suit brought by the plaintiff *Mst. Shala* for the recovery of $\frac{7}{8}$ th share in a certain property which admittedly once belonged to her father *Alam Din*. On the latter's death his rights in that property devolved upon his widow *Mst. Hakam Bibi* and his minor daughter *Mst. Shala* in the proportion of $\frac{1}{8}$ and $\frac{7}{8}$ respectively according to Mohammedan law. A question had been raised in the initial stages of the litigation as to whether the daughter was excluded by custom. It has been found by all the Courts that no such custom has been established and no further question relating to it was re-agitated in the appeal before the Board.

Alam Din died indebted to the extent of about Rs. 400 to the defendants (or their predecessors) who instituted a suit for recovery thereof, impleading both *Mst. Hakam Bibi* and *Mst. Shala* as the legal representatives of the deceased. Subsequently, however, the plaintiffs discharged the daughter *Mst. Shala* and obtained a consent decree against *Mst. Hakam Bibi* alone for Rs. 400. In execution of the decree the entire property which is now in dispute was sold for a much larger sum. After satisfaction of the decretal amount a surplus of Rs. 899-4-0 out of the sale price was deposited in Court and withdrawn by *Mst. Hakam Bibi*. The decree-holders themselves purchased the property and obtained possession as a result of the auction sale. *Mst. Shala* who was a minor living with her mother during the litigation already referred to, has since attained majority and

*Reported as 2 J. & K. L. R. 222.

brought the present suit for recovery of possession of $\frac{7}{8}$ th share in the property in possession of the decree-holders, auction-purchasers, who are the defendants. Her claim is based on her right of inheritance in her father's property according to Mohammedan Law. As already stated the custom pleaded by the defendants having been negatived there can be no doubt that she was the owner of $\frac{7}{8}$ th of the property which was sold in execution of the decree obtained by the defendants.

The main contention which was put forward by the defendants and which has been reiterated in this appeal is that *Mst. Hakam Bibi* represented the estate of the debtor, namely, her husband in the suit brought by the defendants for recovery of Rs. 400 for which a decree was passed and for the satisfaction of which the debtor's property was sold and purchased by them. The defendants' case is that a decree obtained by a creditor against the estate of a debtor represented by one of several heirs binds his other heirs though they were not impleaded and that a sale in execution of such decree conveys the title of the debtor including the interest of the heirs not impleaded in the suit. This defence was overruled by the Sub-Judge Poonch who tried the suit and he passed a decree in favour of the plaintiff *Mst. Shala* subject to payment by her of Rs. 350 which represents her share of the debt due from her father the original debtor. On appeal by the defendants the District Judge Poonch upheld the defence and dismissed the suit. In second appeal the High Court reversed the decree of the District Judge and restored that of the Subordinate Judge.

In the present appeal by the defendants it has been strenuously argued by the learned counsel for the defendants-appellants that, in the absence of fraud or collusion, a sale in execution of a decree passed in a suit for recovery of a debt due from a deceased debtor to which only some of his heirs are parties is binding on all the heirs including those not impleaded. Accordingly it is contended that *Mst. Hakam Bibi* the widow of the debtor effectively represented the estate of her husband in the suit brought by the defendant-appellants and that the decree passed against her is equally binding on his minor daughter *Mst. Shala* though she was discharged from the array

of the defendants. Reliance has been placed upon certain cases decided by the Calcutta and Madras High Courts.

There is a certain amount of conflict of opinion on the question whether a decree obtained by a creditor against some of the heirs of a deceased Muslim debtor is binding on the heirs not impleaded. According to the Allahabad High Court the rights of a deceased Muslim vest immediately on his death in his heirs according to their shares and a decree obtained against some only of the heirs for the debt due from deceased is not binding on the others so that in spite of a sale in execution of such decree the latter can recover their share of the property sold in execution of the decree. According to that Court it makes no difference if the heirs against whom decree was obtained were in entire possession of the property left by the deceased. The leading case is: 'Jafri Begam *V.* Amir Muhammad Khan 7 All. 822', which has been consistantly followed in later cases. See Muhammad Awais *V.* Har Sahai 7 All. 716; Dallu Mal *V.* Hari Dass 23 All. 263; Manni Gir *V.* Amar Jati 58 All. 594. The Chief Court of Oudh has taken the same view, see Amir Jahan *V.* Khadim Husain (31) A.O. 253 and Sakina Begum *V.* Shahar Banoo Begum (1935) 10 Luck. 443. The Bombay High Court have taken much the same view. See Bhagirthibai *V.* Roshanbi (1919) 43 Bom. 412 and Shahasaheb *V.* Sadashiv (1919) 43 Bom. 575. The Calcutta High Court does not appear to have adopted a uniform rule on the subject. On the whole that Court is inclined to the view that subject to certain exceptions sale held in execution of a decree against some only of the heirs is binding on the others though not parties to it. See Muttyjan *V.* Ahmed Ally 8 Cal. 370 and Amir Dulhin *V.* Baij Nath 21 Cal. 311. The important exceptions which the Calcutta High Court seems to have made are where a decree was obtained by fraud or by consent. See Assamathem *V.* Roy Lutchmeeput Singh 4 Cal. 142, 155. They treat such a suit as if it were an administration suit. In Abbas Naskar *V.* Chairman, District Board 24 Parganas (1932) 59 Cal. 691, a further exception seems to have been engrafted to the effect that the heir against whom the decree was obtained must be

one in possession of the estate on behalf of the other heirs. The Madras High Court has eventually adopted the Allahabad view after overruling some early decisions to the contrary. See, *Abdulmajid V. Krishnamacharya* 40 Mad. 243, 255, 257.

The sheet anchor of the learned advocate for the appellant is the view taken by the Calcutta High Court. On the facts of the present case even that view cannot support his contention as the decree obtained against *Mst. Hakam Bibi* was a consent decree. A sale in execution of such decree is tantamount to a voluntary alienation by the heir who was a party. The fact that the alienation is made for payment of the debt of the deceased ancestor does not render it valid (*Matadin V. Ahmed Ali* 39 I. A., Page 49—13 I. A. page 976). On principle there is no difference if one of the heirs instead of selling the estate by private treaty suffer a decree to be passed for the debt of the deceased ancestor and allows the estate to be sold in execution of such decree behind the back of the other heirs.

On the face of it the procedure adopted by the appellant in their suit for money was open to serious objection. They treated both the widow and the minor daughter as heirs in the first instance and impleaded them as defendants. Subsequently they deliberately discharged the daughter and obtained a consent decree against the widow only and in execution of such decree they had the entire property sold for more than three times the decretal amount and purchased it themselves. A sale of only $\frac{1}{3}$ would have been sufficient for the satisfaction of their decree. In these circumstances the sale cannot be up-held in the view of law taken by any of the High Courts including the Calcutta High Court. The Board are satisfied that the conclusion reached by the learned Judges of the High Court in this case is fully warranted even by the case law more favourable to the appellants. The Board should not be understood to be dissenting from the view taken by the High Court of Allahabad and other Courts which followed it but the Board do not consider it necessary to express any decisive opinion beyond what is implied in the decision of this particular case.

The learned advocate for the appellants argued in the alternative that the plaintiff-respondent *Mst. Shala* should have been made liable to pay the entire price paid by them as a condition precedent to the delivery of possession to the plaintiff of her $\frac{7}{8}$ th share. Reliance is placed on what happened in the course of the execution proceedings which followed the decree. It appears that *Mst. Hakam Bibi* remarried after the sale in execution of decree and the decree-holders proceeded on the assumption that she forfeited her right of inheritance in the property of her first husband on remarriage by reason of a custom. Accordingly they applied for removal of her name from the record and for substitution of her daughter *Mst. Shala*, under the guardianship of her mother *Mst. Hakam Bibi*. For all practical purposes *Mst. Hakam Bibi* remained on the record. There is no evidence of the custom assumed by the decree-holders nor was there any justification for *Mst. Shala* being impleaded as a party to the execution proceedings. The surplus sale proceeds were withdrawn by *Mst. Hakam Bibi* in her capacity as guardian of *Mst. Shala* who was treated as the real judgment-debtor. It is contended on behalf of the appellants that *Mst. Shala* should be deemed to have withdrawn the money through her guardian *Mst. Hakam Bibi* and that the latter did not act on her own behalf. This line of argument does not appear to have been taken in any of the Courts below as we find no trace of it in the judgment of the High Court. It is alleged that *Mst. Hakam Bibi* had obtained a formal certificate of guardianship under the Guardian and Wards Act and acted on its authority. There are no materials for the Board to arrive at any conclusion on this part of the case and it is impossible for them to give effect to this contention even if it were sound. The plaintiff is entitled to recover her $\frac{7}{8}$ th share in her father's property subject to payment of his debt as held by the High Court. If she be deemed to have withdrawn the surplus sale proceeds in the circumstances alleged by the defendants, she cannot be made liable for it as a condition precedent to her taking possession. She was no party to the suit and the decree for money and her alleged liability in this respect cannot be adjudicated upon in these proceedings. The appellants, if they can establish their claim,

should have recourse to a separate suit.

In the result the Board are of opinion that the decree of the High Court is correct. Accordingly they humbly advise His Highness to dismiss the appeal with costs.

Board of Judicial Advisers.

*Before the Hon'ble Chowdhary Niamat Ullah, Pesident,
the Hon'ble Dr. Prosanto Kumar Sen,
and
the Hon'ble Pt. Shiam Krishna Dar.*

1945

June 21

BHAGAT SUKHDIAL DUNI CHAND—
APPELLANT

2002

versus

PUNJAB KASHMIR BANK, SRINAGAR—
RESPONDENT.

Har 8

CIVIL APPEAL NO. 24 OF 1945.

Limitation Act (IX of 1995)—Section 14—Exclusion of time spent in another proceeding with due diligence and good faith—Suit instituted under Order XXXVII, Civil Procedure Code for summary disposal—Subsequently plaint returned on request of counsel with permission to file it before a Court of competent jurisdiction after making due amendment—Whether plaint returned under Order VII, rule 10 or Order XXIII, rule 1, Civil Procedure Code—Application of section 14 Limitation Act.

A suit was instituted under Order XXXVII, Civil Procedure Code for summary disposal. On the pleadings it appeared to the High Court that the suit instead of being prosecuted under Order XXXVII, Civil Procedure Code for summary disposal, should be instituted elsewhere for hearing in proper form by the Court of competent jurisdiction. The High Court ordered return of plaint to the plaintiff, as requested by his counsel, to file it before a Court of competent jurisdiction after making due amendment.

Held, that the appropriate section under which the summary suit is terminated and the plaint returned

is Order VII, rule 10, and not Order XXIII, rule 1, Civil Procedure Code. That being so, the provisions of Order XXIII, rule 2, have no application and there is no bar to the application of section 14 of the Limitation Act, as no question is raised that there was lack of diligence or good faith in prosecuting the suit under Order XXVII in the High Court.

APPEAL AGAINST THE ORDER OF THE HIGH COURT OF JUDICATURE, DATED 28TH SAWAN 2001.

MESSRS SUNDER LAL AND HIRDAY NATH—For the Appellant.
MESSRS A. N. KAK AND SATYAPAL—For the Respondent.

The judgment of their Lordships was delivered by :—

Hon'ble Dr. Prosanto Kumar Sen.—The litigation out of which this appeal arises first took the form of a summary suit in the High Court, instituted on the 31st *Jeth*, 1999 (26th June, 1936) by the Punjab and Kashmir Bank, the respondent before the Board, against the firm of Bhagat Sukhdial Dunichand, appellants, (of which Dunichand is the sole proprietor) on the basis of a promissory note for Rs. 2,719-5-0. In the course of the trial of this suit it transpired that the promissory note in dispute was not a transaction by itself and was not for consideration in cash. The Advocate for the plaintiff Bank at that stage put in an application for the return of the plaint with permission to present it before the proper Court after making due amendments. An order was accordingly passed by the High Court on 1st *Magh*, 1999 (14th January, 1943) returning the plaint to the plaintiffs and ordering that the defendants should have an opportunity of meeting the amendments, when made. Immediately after this the Civil Court holidays commenced and eighteen days later, on the re-opening of the Courts after the holidays, the amended plaint was presented in the Court of the City Judge, Srinagar, on the 19th *Magh*, 1999 (1st February 1943). In this plaint the facts and circumstances leading up to the execution of the promissory note in suit were thus set out. The defendant firm had dealings with the plaintiff Bank

for a long time. On 8th July, 1930 the accounts were settled and on that date a cash credit limit for Rs. 6,000 was allowed to the defendant and in pursuance of this cash credit arrangement the defendant had dealings with the Bank with a debit of Rs. 2,719-5-0, standing against him on 23rd June, 1936. There was another account running against the defendant under the title Kashmir Auto Mobile Stores for the balance of which a suit had been filed in the Court of the City Judge, Srinagar, before the 23rd June, 1936. On the 23rd June, 1936, the defendant approached the Directors of the Bank for an amicable settlement, as a result of which the Bank passed a Resolution on the said date in the following words:—

“ That after Bhagat Duni Chand Sahni admits Bank's claim in Srinagar Court and renews the pro-note for the amount due by him, he may be given in writing that the Bank would recover Rs. 3,200 Rupees three thousand two hundred only plus 6 per cent. p. a. future interest only to be recovered from him out of the decree against him and the Pro-note account, in cash or through some debts given to the Bank by him for recovery and collection.”

In pursuance of this Resolution on 26th June, 1936, the defendant executed the pro-note in suit. Several pleas were taken in defence and out of them the following need only be mentioned. First, that the suit was barred by the law of limitation; secondly, that the suit was not maintainable on the basis of the pro-note as it was not for consideration and also in view of the arrangement mentioned in the Resolution aforesaid; and thirdly, that several debts due to the defendant were transferred by him to the Bank for collection and credit to his account, that certain decrees had been obtained by the Bank on the basis of those claims and several sums realised by the Bank for which the defendant was entitled to credit.

The trial Judge went into the matters in dispute in great detail. On the point of limitation he held in favour of the plaintiff that section 14 of the Limitation

Act applied. On the main question as to the maintainability of the suit and the liability of the defendant he observed: "The learned counsel for the plaintiff admitted in his statement dated 20th *Maghar*, 2000, that the plaintiff is prepared to act upon the Resolution provided that the defendant admits the other suit under the title Punjab Kashmir Bank Vs. Kashmir Automobile Stores. The advocate for the defendant has also admitted that according to the conditions laid down in the Resolution he is prepared to admit the above mentioned claim of the plaintiff. In his statement of the date in other case the *Mokhtar* of the defendant has admitted the plaintiff's suit. The defendant has adhered to the terms of the Resolution so far as he is concerned. The plaintiff is now bound to abide by the Resolution as admitted by his advocate." The learned trial Judge held, mainly on the facts above mentioned, that the plaintiff's suit must be treated as based on the Resolution. On the third plea, he held that only those amounts were to be credited to the defendant which had been or would be actually realised by the plaintiff Bank and that the plaintiff would be entitled to deduct from the realisations such costs as he might have incurred, in instituting suit, obtaining decrees and defraying other expenses of realisation. Accordingly, on the basis of the Resolution dated 23rd June 1936, the trial Court gave a decree for Rs. 3,200 plus interest at 6 per cent. from the date of passing the Resolution to that of instituting the suit Rs. 1,145, that is, for Rs. 4,345 minus the sum or sums which might actually have been realised by the plaintiff Bank out of the debts assigned and transferred to it by the defendant. These amounts were to be ascertained in execution proceedings, and the costs of realisation incurred by the plaintiff Bank were to be duly taken into account in ascertaining what amounts were to be deducted. Future interest was granted at 6 per cent. per annum from the date of the decree to the date of satisfaction.

On appeal by the defendant, the High Court upheld the decision of the trial Court on the point of limitation. On the main question as to whether, and for what sum, the defendant was liable, the learned Judges of the High Court held that as the suit

was for the recovery of a sum of Rs. 2,719-5-0, a decree for a sum larger than that claimed could not be passed in it. They, however, held that the pro-note was proved both as regards its execution and consideration, and that the plaintiff Bank was entitled to a decree on the basis of the pro-note. Accordingly, a decree was passed for Rs. 2,719-5-0 minus such sums as might be proved before the executing Court to have been realised by the Bank out of the claims transferred to it by the defendant as above mentioned. Interest was reduced to 3 per cent. from the date of the institution of the suit on such sums as had been left un-realised up to the date of realisation.

Before the Board the learned advocate for the defendant has contended that the provisions of section 14 of the Limitation Act would not be applicable to the facts of this case. Now there is no doubt that if the period of time spent in the prosecution of the suit in the High Court were allowed the plaintiff's suit would be in time. It is urged on behalf of the defendant-appellant that the provisions of section 14 of the Limitation Act would not apply. The ground on which he rests this argument is that he characterises the application of the plaintiff dated the 1st *Magh*, 1999 (14th January, 1943), upon which the High Court passed the order returning the plaint for presentation in the proper Court, as an application for withdrawal under the provisions of Order 23, rules 1 and 2. The Board are of opinion that this contention is untenable. Had the plaintiff voluntarily withdrawn the suit filed in the High Court under Order 37, Civil Procedure Code with leave to institute a fresh suit, the provisions of Order 23, rule 2, Civil Procedure Code might have been applicable, and in that case the advantage of section 14 of the Limitation Act would not have been available to the plaintiff. What actually happened, however, is that on the pleadings it appeared to the High Court that the suit instead of being presented under Order 37, Civil Procedure Code for summary disposal, should be instituted elsewhere for hearing in proper form by the Court of competent jurisdiction. It thereupon passed the order in the following terms:—

“In course of the trial it transpired that the

pro-note was not a transaction by itself and was not for consideration in cash. Mr. Dina Nath at this stage puts in an application for return of the plaint with permission to file it before a Court of competent jurisdiction after making due amendments. Let the plaint be returned to the plaintiff."

In view of the terms of the order it is perfectly clear that the appropriate section under which the summary suit was terminated and the plaint returned was Order 7, rule 10 and not Order 23, rule 1. That being so, the provisions of Order 23, rule 2 have no application and there is no bar to the application of section 14 of the Limitation Act, as there is no question raised in this case that there was lack of diligence or good faith in prosecuting the suit under Order 37 in the High Court. In the opinion of the Board, therefore, the view taken by the High Court on the question of limitation is correct.

The only other point relates to the amount of the decree. As the suit is based on the pro-note for Rs. 2,719-5-0 the decree can only be for that sum with interest, and the High Court has passed a decree on that footing allowing deductions of such amounts as may have been realised by the plaintiff Bank out of loans assigned to it by the defendant. There was a point of contention between the parties regarding the Resolution of the Bank, dated 23rd June, 1936, *i. e.*, as to whether that did or did not lay down the uppermost limit of plaintiff's dues on all claims against the defendant to be Rs. 3,200. Learned counsel for the plaintiff-respondent has conceded this point before us in favour of the defendant, so that both parties are agreed that the plaintiff-appellant would be entitled to realise from the defendant in the two suits no more than Rs. 3,200 as principle sum less such amounts as he may have realised on the footing of the transferred loans. The decree of the High Court will accordingly have to be modified in terms of this agreement arrived at between the parties. The Board would, therefore, humbly advise His Highness to affirm the decree of the High Court with the modification aforementioned and to dismiss this appeal with costs.

Board of Judicial Advisors, High Court,

SRINAGAR (Kashmir)

Before the Hon'ble Chowdhary Niamat Ullah, President, 1945
 the Hon'ble Dr. Prosanto Kumar Sen,

and

the Hon'ble Pt. Shiam Krishna Dar.

June 15

2002

FAQIR CHAND *versus* DHARAMARTH TRUST.

Har 2

CIVIL APPEAL NO. 27. OF 1944.

1. Dharamarth Council—Whether competent to appoint a Mahant in case of a vacancy in Dasnami Akhara (Maisuma, Srinagar).

The Board have not been referred to any provision in Regulation I of 1991 or any other law or command of His Highness in support of the contention that the Dharamarth is competent to appoint a Mahant in case of a vacancy in Dasnami Akhara.

Succession to the office of the Mahant of an institution like Dasnami Akhara is ordinarily regulated by usage and unless it is established that by some law in force in the State or by usage the Council of Dharamarth has power to appoint a Mahant for Dasnami Akhara in certain circumstances it cannot be claimed that by virtue merely of its position the Council of Dharamarth is competent to appoint a Mahant in a given contingency.

2. Hindu Law—Religious endowment—Person managing affairs of institution and treated as Mahant by all persons—Property entered in his name in revenue records—Such person is entitled to recover for benefit of institution property which belonged to institution but has not been held by trespassers.

Where a person has been managing the affairs of the institution and has been treated as its Mahant by all the persons interested therein and the property entered in the revenue records in the name of the previous Mahant was, on his death, mutated to him and there is nobody who disputes his title to the office of the Mahant, such a person is entitled to recover, for the benefit of the math, the property which belonged to the math and is wrongfully held by the trespasser.

A. I. R. 1935 P. C. 44 quoted and followed.

3. *Hindu Law—Religious endowment—Debt—Mahant—Power to incur for the benefit of the institution or in a case of need.*

A Shebiat or a Mahant can borrow money and even alienate the debutter property in a case of need or for the benefit of the estate.

APPEAL AGAINST THE ORDER OF THE HIGH COURT OF JUDICATURE, DATED 22ND BHADON 2001.

MR. MEHAR CHAND, ADVOCATE AND L. SUNDER LAL, ADVOCATE—For the Appellant.

PT. A. N. KAK, ADVOCATE—For the Respondent.

The judgment of their Lordships was delivered by :—

Hon'ble Chowdhary Niamat Ullah.—Defendant Faqir Chand is in possession of the property in dispute consisting of four shops and five garages in Bazar Maisuma, Srinagar, under a lease dated 24th *Baisakh*, 1995 executed by Birgir, Mahant of *Dasnami Akhara*, for a period of 25 years in lieu of Rs. 5,000 payable at the rate of Rs. 200 a year to be set off against the usufruct of the lease hold properties. The remaining usufruct is to be appropriated, under the terms of the lease, as interest. Birgir died on 9th *Jeth*, 1995 and the suit which has given rise to this appeal was brought on 4th *Jeth*, 1998 by the *Dharmarth Trust* and Mahadevgir. The latter appears to have been appointed a Mahant of *Dasnami Akhara* by the former in the exercise of an alleged power in that behalf. The relief claimed by the plaintiffs is the declaration that the lease is void, being in excess of the powers of Birgir who was in possession of the property only as Mahant or manager of the *Dasnami Akhara* to whom the property really belonged and for possession of the same. The plaintiffs also claimed rendition of account of the income received by the defendant during the time of his possession.

The suit was resisted by the defendant who denied that the property in dispute appertained to the

Akhara. He alleged that Birgir was the owner of the property and had full disposing power over it. He denied that *Dharmarth* had power to appoint the other plaintiff Mahadevgir as the *Mahant* of the *Dasnami Akhara* in succession to Birgir. In the alternative the defendant pleaded that the shops and the garages were constructed by Birgir on a vacant piece of land and to raise funds needed for that purpose the lease in question was executed and that the sum of Rs. 5,000 advanced by him was spent on the new constructions which will be a source of income to the institution. It is said that the transaction evidenced by the lease was for the benefit of the institution and the purpose for which the loan had been contracted amounted to legal necessity. Accordingly it is pleaded that the lease is binding on the plaintiffs if they are found to be entitled to represent the institution.

The Senior Subordinate Judge, Kashmir, who tried this suit held that the site on which the shops and the garages in dispute were constructed belonged to the *Dasnami Akhara* of which Birgir was the *Mahant* and that *Dharmarth Trust* had validly appointed the plaintiff Mahadevgir as the *Mahant* of the *Akhara* in succession to Birgir who had died without making any appointment. As regards the validity of the lease the learned judge found that the defendant had advanced Rs. 5,000 for the constructions made by Birgir but that increasing the income of the institution which was otherwise self-supporting cannot be regarded as a purpose justifying a loan. Accordingly he cancelled the lease and decreed the plaintiff's suit for possession subject to payment of Rs. 5,000, the sum advanced by the defendants less Rs. 1,000 which the defendant appropriated out of the usufruct of the property at the rate of Rs. 200 a year during the time of his possession. To this he added Rs. 2,000 as interest by way of damages according to a covenant in the lease.

Both parties appealed to the High Court and the decree of the trial Court was challenged by the plaintiffs in so far as it made them liable to pay Rs. 6,000 while the defendant questioned the finding of the trial Judge as regards the validity of the lease.

Agreeing with the first Court the learned Judges of the High Court held that the property in dispute is dedicated property and that the plaintiff Mahadevgir was a validly appointed *Mahant* of *Dasnami Akhara*. They, however, disagreed with the trial Judge as regards the passing of consideration under the lease. They found that Birgir had borrowed not more than Rs. 1,300 towards the construction of the premises in question and that the defendant has recovered more than that amount from the income of the property during the time he was in possession. In that view the plaintiff's suit was decreed in its entirety.

In the present appeal by the defendant the principle questions argued by the counsel on both sides are :—

1. whether the site, on which the shops and the garages were admittedly constructed by Birgir, has been proved to be dedicated property appertaining to the *Dasnami Akhara* of which he was the *Mahant* or it was his personal property which he could dispose of in any manner he chose ;

2. if it is found that the site formed part of the endowment in favour of the *Akhara*, whether the plaintiffs or any of them is competent to maintain the suit on behalf of the institution, which involved the further question whether the *Dharmarth* had a right to appoint the plaintiff Mahadevgir as *Mahant* in succession to Birgir in the exercise of its alleged power of control and management of that institution ;

3. whether the appellant had advanced Rs. 5,000 for the construction of the shops and the garages for such purpose as is recognized by law to be necessary so as to bind the institution with all the covenants contained in the lease which, in that view, must be deemed to be valid and enforceable against the succeeding *Mahant* ; and

4. whether, as the result of findings the plaintiffs or any of them is entitled to any and what relief.

As already stated *Dharmarth* figures as the first

plaintiff in the case and claims the right to appoint, in case of vacancy, a *Mahant* for the *Dasnami Akhara*. Besides general power of supervision and control the *Dharmarth* does not claim for itself the right of direct management or possession of the endowed property. If the *Dharmarth* had been the sole plaintiff a serious question would have arisen as to whether, in any view of the case, it is entitled to sue and recover possession of the property in dispute. In view, however, of Mahadevgir's presence in the array of parties as plaintiff No. 2 who claims to be the validly appointed *Mahant*, the *locus standi* of the *Dharmarth* as the first plaintiff calls for no serious consideration if the former is found entitled to the reliefs claimed in the suit.

Both the Courts have concurrently found that the site on which Birgir constructed the shops and the garages is dedicated property in which he had no personal right and which was in his possession as the *Mahant* of the *Dasnami Akhara*. The Board are of opinion that this finding is supported by good evidence furnished by the recitals contained in the lease and entries in the Revenue record. The lease itself purports to have been executed by Birgir in his capacity as *Mahant* and contains a definite representation that the site belongs to the *Dasnami Akhara* which will be greatly benefited by the addition to its income as the result of new constructions. The defendant accepted the lease on the understanding that he was to hold the property on behalf of the *Akhara* as the real lessor and that Birgir executed the lease as its *Mahant*. In these circumstances it is not open to the appellant to deny the title of his lessor, the *Akhara*, and to maintain that the property belonged to Birgir personally and that he and not the institution he represented, was the lessor. In this view there can be no doubt that the finding arrived at by the High Court in agreement with the trial Judge is correct.

As to whether the plaintiffs or any of them is entitled to maintain this suit the learned Judges of the High Court have relied upon the evidence of two witnesses Sant Ram and Shiv Nath who are both employees of the *Dharmarth* and deposed from a

certain file maintained in its office. It appears that there is an institution known as "*Chhari Amar Nath*". It is represented by a silver stick which is the emblem of the famous shrine at Amarnath. The stick is placed on a "*Thara*" (a small platform) adjacent to the *Dasnami Akhara*. At a given time in the year the stick is ceremonially carried to Amarnath and brought back to its "*Thara*" where it is worshipped all the year round as the shrine itself is ice bound for the most part of the year and is inaccessible to the worshippers. The person in charge of the stick who supervises the worship is the *Mahant* of "*Chhari Amar Nath*." Upto a certain time that institution had its own *Mahant* while the *Dasnami Akhara* had another *Mahant*, the two institutions being independent. The two offices were, however, combined in the person of *Mahant Baldevgir* the Guru of Birgir who was at first the *Mahant* of *Dasnami Akhara* but was, on a vacancy occurring in the line of *Mahants* of *Chhari Amar Nath*, appointed by His Highness as the *Mahant* of the latter also. After Baldevgir's death which occurred in 1963 (1906 A. D.) Birgir who was the *Chela* of Baldevgir succeeded to the latter as a *Mahant* of *Dasnami Akhara* and was also appointed as the *Mahant* of *Chhari Amar Nath* by His Highness. The evidence accepted by the High Court showed that Baldevgir and Birgir were appointed *Mahants* of *Chhari Amar Nath* on the recommendation of the *Dharmarth*. The trial Judge and the High Court inferred from these circumstances that the *Dharmarth* had "the control and supervision" of both the institutions and was therefore competent to appoint a *Mahant* after the death of Birgir. The learned counsel for plaintiff-respondent relies on Regulation No. 1 of 1991 (old Constitution Act) and argues that the *Dharmarth* had power to appoint Mahadevgir in succession to *Mahant* Birgir. On examination, however, of the provisions of that Regulation it is clear that this contention is not well founded. Reference was made to section 7 which merely reserves all inherent powers of His Highness and throws no further light on the power of *Dharmarth*, in the matter of appointment of *Mahants*. Section 24, however, empowers the Council of *Dharmarth* to appoint *Mahants* of certain specified institutions but *Dasnami Akhara* is not one of them. It

expressly excludes the power of appointing a *Mahant* of *Chhari Amar Nath* whose appointment rests with His Highness. The Board have not been referred to any provision in this Regulation or any other law or command of His Highness in support of the contention that the *Dharmarth* is competent to appoint a *Mahant* in case of a vacancy in *Dasnami Akhara*. It is not disputed in this case that His Highness appointed Baldevgir and after him Birgir as *Mahants* of *Chhari Amar Nath* who happened to be also *Mahants* of *Dasnami Akhara*. It is not suggested that His Highness' order of appointment extended to *Dasnami Akhara* also. It is significant that in the plaint it is alleged that His Highness appointed these persons as *Mahants* of *Chhari Amar Nath* and that after the death of Birgir His Highness appointed Mahadevgir as the *Mahant* of *Chhari Amar Nath*. It is not suggested that his order extended to the appointment of a *Mahant* for *Dasnami Akhara*. It is also alleged in the plaint that Mahadevgir has been appointed by His Highness as *Mahant* of *Chhari Amar Nath* and that it was the Council of *Dharmarth* who appointed him as the *Mahant* of *Dasnami Akhara*. The Board have not been referred to any authority in support of the contention that the Council of *Dharmarth* has the power to appoint a *Mahant* in case of vacancy in *Dasnami Akhara*. That the *Dharmarth* has power of control and supervision over the affairs of *Dasnami Akhara* is also not borne out by any authority. Succession to the office of the *Mahant* of an institution like *Dasnami Akhara* is ordinarily regulated by usage and unless it is established that by some law in force in the State or by usage the Council of *Dharmarth* has power to appoint a *Mahant* for *Dasnami Akhara* in certain circumstances it cannot be claimed that by virtue merely of its position the Council of *Dharmarth* is competent to appoint a *Mahant* in a given contingency. In this view the Board are unable to up-hold the finding of the trial Judge and the High Court that Mahadevgir is the validly appointed *Mahant* of *Dasnami Akhara*. It has not been contended before the Board that the Council of *Dharmarth* can, in the absence of a validly appointed *Mahant*, directly manage the affairs of *Dasnami Akhara* and that therefore it is entitled to maintain a suit like this. Such a contention, if it

had been put forward, would have been without force as there is nothing to suggest that in relation to *Dasnami Akhara* the Council can assume any such power.

Realizing his difficulty the learned counsel for the respondent adopted an alternative line of argument. He contended that, at all events, Mahadevgir is the *de facto Mahant* of the *Dasnami Akhara*, being in possession of all its properties and in charge of all its affairs and as such he is in law competent to maintain an action against those who may be found to be in unlawful possession of the property belonging to the *Akhara*. On the authorities to which the Board have been referred this contention is well founded. Learned counsel for the appellant has, however, controverted the premises on which such conclusion is based. It is denied that Mahadevgir is in possession of all the properties of the *Akhara*. The only property, besides that in dispute which, it is said, is not in his possession consists of a few shops which are in possession of certain transferees. It cannot, however, be denied that Mahadevgir is in all other respects functioning as the *Mahant* of *Dasnami Akhara*. If Mahadevgir had been appointed a *Mahant* in pursuance of law or usage applicable to the case and therefore validly appointed he would have been precisely in the same position as he occupies now *vis-a-vis* the affairs of the institution. The transferees who may be in possession of part of the property, belonging to the *Akhara* are either lawfully in possession or as trespassers. In the former case Mahadevgir cannot be said to be out of possession of any property which *Dasnami Akhara* is entitled to be in possession of. In the latter case the property is to be recovered from trespassers in whose favour limitation may be running and unless the person who is the *de facto Mahant* be held to be entitled to enforce the right of the institution which he professes to represent great injustice may result from giving effect to the argument that the *de facto Mahant* is not the *de jure Mahant* and therefore not entitled to maintain a suit for ejectment of trespassers. In *Mahadev Prasad Singh and others Vs. Karia Bhatthi*, A. I. R. 1935, P. C. page 44, it was definitely held by their Lordships of the Privy Council that, "where a

person has been managing the affairs of the institution and has been treated as its *Mahant* by all the persons interested therein, and the property entered in the revenue records in the name of the previous *Mahant* was, on his death, mutated to him and there is nobody who disputes his title to the office of the *Mahant*, such a person is entitled to recover, for the benefit of the *math*, the property which belonged to the *math* and is wrongfully held by the trespasser." Learned counsel for the appellant distinguishes this case on the ground that one Indergir disputes the title of Mahadevgir and contends that the rule applies only to those cases in which there is no rival claimant. It is said that Indergir, the brother of Birgir claims to be his *Chela* and as such entitled to succeed to him in the office of the *Mahant*.

In support of this assertion we are referred to nothing better than an indication in the defendant's own written statement, paragraph 16, in which it is alleged that "Indergir minor and others have also filed a suit for the property left by Birgir." If Indergir has filed a suit, as is alleged, it is not known what the basis of his claim is. It may be that he claims the property left by Birgir as one of his heirs treating it as personal property of Birgir. If such is the case, it can hardly be said that there is a rival claimant to *Mahantship*. In another part of the written statement it was alleged as a fact that Birgir appointed Indergir as his "successor." No evidence in support of this allegation has been produced. It is admitted by the defendant in paragraph 3 of his written statement that on the death of Birgir the *Dharmarth* took possession of the property left by *Mahant* Birgir of *Dasnami Akhara*. This possession is, however, characterised as 'wrongful and taken by force.' This amounts to an admission that after the death of Birgir the *Dharmarth* took over the entire charge of the affairs of *Dasnami Akhara*. It is in evidence that subsequently Mahadevgir was appointed by the *Dharmarth* as the successor to Birgir and put in possession of the *Akhara* and its properties. There is every reason to think that, rightly or wrongly, the *Dharmarth* considered itself entitled to take charge of the affairs of *Dasnami Akhara* after the death of Birgir, who had appointed no successor, and to

appoint a suitable person as the *Mahant* of *Dasnami Akhara*. Birgir died, in 1987 and Mahadevgir has been functioning as the *Mahant*, from time not long after his death. Mahadevgir's position as *Mahant* has never been questioned by any one claiming the office of *Mahant*, and if he had not instituted the present suit the defendant Faqir Chand would probably have been willing to recognize him as a rightful successor to Birgir. Under these circumstances the Board are of opinion that Mahadevgir is the *de facto Mahant* of *Dasnami Akhara* and as such entitled to sue for recovery of the *Akhara* property from those who may be found to be in unlawful possession thereof. If the lease under which the defendant-appellant is in possession of the shops and the garages is not valid, wholly or partially, the plaintiff Mahadevgir can obtain appropriate relief for the institution which he professes to represent.

The next question is whether the lease dated 24th *Baisakh*, 1995 is valid to any extent. It recites, after detailing the land conveyed by it, that the constructions made thereon were incomplete, and continues as follows :—

“ In order to make the said building habitable and to yield income I felt the necessity of borrowing more money. I have already borrowed a sum of Rs. 4,000 from Faqir Chand for completion of the afore-said construction, and have settled to borrow from him one thousand more. The total amount of Rs. 5,000 half of which comes to Rs. 2,500 are due to promisee from the promisor and will be paid out of the income of the property made habitable. Now arrangement is to be made to liquidate the debt. I have no capacity to pay except from the income of the property. Therefore, keeping in view the whole income of this property and the loan of Rs. 5,000 together with the interest at Re. 1 per cent. p. m. which is payable to Faqir Chand we the parties to the bond have come to mutual agreement and come to the understanding that the whole of the said property from the day it is completed which will be done within one month will be placed at the disposal and in the possession of the promisee for a period of 25 years as tenant. The promisee shall credit Rs. 200 annually.

towards the debt of Rs. 5,000 and in this case the amount of interest will not be charged. If the promisee will be in receipt of rent over and above the amount agreed upon then this extra amount will be treated as interest of Rs. 5,000 and will be received by the promisee." Another clause in the lease provides :—" Till the expiry of the stipulated period the promisor or his successors shall have no right to dispossess the promisee from the property : if the promisee is desired to be dispossessed then the promisee will be paid in lump $1\frac{1}{2}$ times of the balance amount.
....."

The trial Court found on consideration of the entire evidence that the sum of Rs. 5,000 had been received by *Mahant* Birgir as stated in the lease. The High Court did not accept this finding and held that one thousand rupees therein referred to was the only part of the consideration which has been proved to have passed under the transaction. The High Court added another sum of Rs. 300 which the lessee subsequently spent on the building. As already stated in an earlier part of this judgment the High Court held that the lessee recovered from the profits of the property the sum of Rs. 1,300 which he had advanced.

The Board were taken by learned counsel on both sides through the entire evidence, oral, and documentary, so far as it bears on the question of the passing of consideration. It appears that when the lease was executed *Mahant* Birgir was a young man of about 35. Though he suffered from occasional attacks of gout, there was no reason for him to anticipate a premature death nor is there any suggestion in the evidence that by entering into a transaction of the kind disclosed by the lease he fraudulently desired to benefit the lessee who, it may be mentioned, was his brother-in-law (sister's husband), at his own expense. As matters stood on the date of the lease, *Mahant* Birgir was committing himself to a liability which he must have known could be enforced against him. In this view it is highly improbable that he would make a gratuitous admission of having borrowed from *Faqir Chand* a large sum of money though in fact he had not. In the opinion

of the Board the recital in the deed is a strong piece of evidence so far as the passing of the consideration is concerned. It is substantially corroborated by the evidence of Faqir Chand himself and that of *Mst. Parvati*, the mother of *Mahant Birgir*. It is true that both of them are interested in supporting the defendant's case but taking with the recitals and the evidence afforded by exhibits D2 and D3 which are letters of Birgir to Faqir Chand and which show that certain loan transaction had taken place between them and that they were perfectly on business footing with each other their evidence cannot be lightly set aside. In Ex. D3 Birgir tells Faqir Chand that if he did not like to make further advances he might take back the money that had been advanced till then otherwise he should send the sum remaining unpaid. The pass book of Birgir who had an account in the post office savings bank also shows that during the relevant period he withdrew what were large sums having regard to his position in life. Taking the cumulative effect of the entire evidence the Board are of opinion that the story of the defendant is true and that during the later stages of the construction of the building he advanced Rs. 4,000 and the remaining one thousand was paid on the execution of the lease. Their conclusion is strengthened by the absence of evidence to the contrary. It is argued for the plaintiffs that they had no means of rebutting the case set up in defence. It cannot be denied that they could have adduced evidence at least to prove that at or about the time when the lease was executed the building had been completed and that there was no necessity for borrowing any money for that purpose. An attempt to establish some such case appears to have been made by the plaintiffs who produced a prior lease executed by Birgir on 29th *Maghar*, 1993 in favour of one Qadirjoo from whom Birgir had borrowed Rs. 6,500. It was argued that the building had been constructed with the funds thus raised and that there was no necessity of borrowing any more money from Faqir Chand. It may be true that in 1993 Birgir had borrowed that sum of money from Qadirjoo but it may be equally true that that sum did not suffice for the completion of the building and further sums were required for the completion of the building which were borrowed in

1994. It may also be a fact that the sum borrowed from Qadirjoo or part of it had been spent by Birgir for other purposes and he had to borrow from Faqir Chand to complete the building. What matters is the state of things that existed at the time when Faqir Chand advanced the money. If at that time the building was incomplete and there was immediate necessity for the loan advanced by Faqir Chand, previous acts of Birgir in misapplying the funds belonging to the endowment or the money borrowed from Qadirjoo cannot affect the validity of the loan advanced by Faqir Chand. It is only if the plaintiff had rebutted the defendant's case by showing that the building was complete and that money was in fact not needed for the completion of the building, doubt could be thrown on the validity of the loan advanced by Faqir Chand. There is no evidence of this character. If the circumstances existing at the time when the loan is advanced are such as would have disclosed the existence of necessity if the lender had inquired, the validity of the loan is established and the previous mismanagement on the part of the borrower does not affect it. In this view it must be held that the entire sum of Rs. 5,000 was advanced by Faqir Chand for a necessary purpose.

It has been contended by the learned advocate for the plaintiffs that in order to amount to legal necessity it should be found that there was a pressure on the estate and that the mere fact that the loan had been taken for increasing the income of the endowment cannot amount to legal necessity. This contention is not sound. The proposition is well established that a *Shebiat* or a *Mahant* can borrow money and even alienate the debutter property "in a case of need or for the benefit of the estate." (See *Hunooman Persad Vs. Mussammatt Babooee* (1856) 6 M. I. A.). In that case the power of a *Shebiat* or a *Mahant* was held to be analogous to that of a manager of an infant heir. In later cases their Lordships of the Privy Council have consistently taken the same view. In many cases when money is borrowed for the benefit of the estate, necessity therefor becomes a necessary implication. It is the duty of a person situated as a *Shebiat* or a *Mahant* to do everything in his power for the benefit of the

estate he represents. If in the discharge of such duty he has to borrow money, it is a necessary and justifiable act. In the present case the repayment of the loan was agreed to be made out of the income of the new investment. The site on which the shops and the garages have been constructed yielded no income and the investment made with borrowed funds was expected to be sufficiently remunerative to pay off the entire debt without throwing any burden on the estate. In this view there is no doubt that the transaction of the loan evidenced by the lease is perfectly valid, being manifestly for the benefit of the institution.

But the lender had to establish not only that it was necessary to borrow but also that it could not be borrowed except on the onerous terms embodied in the lease. In the present case the lessee is to remain in possession for 25 years and is to appropriate Rs. 200 a year towards principal right up to the end of the term though as each instalment is paid less interest is due to the lessee but he is nevertheless to appropriate a progressively increasing amount as interest. This stipulation is unreasonable. There could be no objection to an arrangement that the lessee should pay himself, out of the usufruct, the principal and a reasonable interest on the unpaid part of it. But in the present case the entire surplus left after the payment of Rs. 200, even after most of the instalments have been paid, is to be appropriated by him towards interest. It is in evidence that the income of the shops and the garages is sufficient to pay the principal and interest at a reasonable rate in much less than 25 years. The plaintiffs are willing to pay the entire sum due to the lessee and recover the property. Under these circumstances the Board are clearly of opinion that they should not be tied down to the term of 25 years. According to the terms of the lease the defendant should be taken to have recovered during the time of his possession Rs. 1,000 at the rate of 200 rupees a year. The plaintiffs offer to pay the remaining part of the principal *viz.*, Rs. 4,000. The learned trial Judge decreed not only Rs. 4,000 the unpaid part of the principal but also half as much more accordingly to the covenant contained in the lease which has already been quoted. The Board

think that the stipultion fixing 25 years coupled with the covenant that in case the lessor desires to resume possession during the term, he must pay the unpaid part of the principal and half as much more was not warranted and that the lessee has failed to establish the necessity of borrowing on those terms. In this view the Board are clearly of opinion that the aforesaid covenant is not enforceable and that the plaintiffs are entitled to recover possession on payment of Rs. 4,000.

Having regard to the conclusions arrived at by the Board they humbly advise His Highness to discharge the decrees of the High Court and the trial Court and substitute therefor a decree to the plaintiff for recovery of possession of the properties in suit on payment of Rs. 4,000 to the defendant and, in all the circumstances of the case, to direct the parties to bear their own costs throughout.

Board of Judicial Advisors

*Before the Hon'ble Chowdhary Niamat Ullah, President,
the Hon'ble Dr. Prosanto Kumar Sen,*

1945

and

the Hon'ble Pt. Shiam Krishna Dar.

July 3

KESHO RAM AND OTHERS—PETITIONERS

versus

MOHD. BHAT AND OTHERS—OPPOSITE-PARTY.

APPLICATION FOR SPECIAL LEAVE TO APPEAL NO.
OF 1944.

*Appeals to His Highness' Act (XVI of
Section 5—Remission to trial Court of dispute as to the
amount or value of the subject-matter of the suit.*

*Section 5 of the Appeals to His Highness' Act
mandatory and the High Court is required itself to
enquire into the allegation or call for a report from the
Court of first instance.*

APPLICATION FOR SPECIAL LEAVE AGAINST THE
ORDER OF THE HIGH COURT OF JUDICATURE, DATED
6TH JETH 2001.

MR. HIRDAY NATH DAR ADVOCATE—For the Petitioners.

MR. SHAMBU NATH DAR ADVOCATE—For the Opposite-Party.

The judgment of their Lordships was delivered by :—

Hon'ble Chowdhary Niamat Ullah —In this petition for special leave to appeal it is alleged that the value of the subject-matter of the original suit and of the appeal to His Highness exceeds Rs. 2,500 and that the High Court not having affirmed the decree passed by the District Judge, the petitioners were of right entitled to a certificate by the High Court under section 2 (a) of the Appeals to His Highness' Act. There are no materials before the Board on which any finding on the question of value can be arrived at by the Board themselves. It appears that in moving their application before the High Court for a certificate of appeal the petitioners definitely alleged that the value of the subject-matter in dispute in the suit and in the appeal to His Highness was Rs. 2,500, and the petitioners expressed their willingness to file an affidavit to that effect. The High Court, however, did not take any notice of this allegation and refused leave on the short ground that the value of the subject-matter of the suit and that of the proposed appeal to His Highness was less than Rs. 2,500. The provisions of section 5 of the Appeals to His Highness' Act, were over-looked in this connection. The section is mandatory and the High Court ought to have itself inquired into the allegation or called for a report from the Court of first instance. In these circumstances the proper course for the Board to adopt is to humbly advise His Highness to set aside the order of the High Court dated 13th *Bhadon*, 2001, refusing leave to appeal, and to direct it to restore the plaintiffs' application for leave to appeal to its original number and dispose it of according to the law with special reference to section 5 of the Appeals to His Highness' Act. They accordingly do so.

Board of Judicial Advisors.

Before the Hon'ble Chowdhary Niamat Ullah, President, 1945
the Hon'ble Dr. Prosanto Kumar Sen,

and

the Hon'ble Pt. Shiam Krishna Dar. May 27

PHAGGU—APPELLANT

versus

Mst. BEANTI—RESPONDENT.

2002

Jeth 16

CIVIL APPEAL NO. 1 OF 1945.

Registration Act (XXV of 1977)—Section 77—
Suit for compulsory registration of document in case of order of refusal by Registrar—Scope of enquiry in such a suit—Enquiry in regard to the passing of consideration or in regard to the proof which the plaintiff had offered before the Sub-Registrar about the non-appearance of the executants is foreign to the scope of the suit.

The scope of enquiry in a suit under section 77 of the Registration Act is limited and well settled. The plaintiff in such a suit has to establish a valid presentation of the document for registration within the time prescribed as also the refusal by the Sub-Registrar and also by the Registrar, under section 72 or 76 of the Registration Act, to register the document on an appeal or application by the plaintiff within the prescribed time. But if these conditions are fulfilled and the execution of the document is admitted any enquiry in regard to the passing of the consideration of the document, or an enquiry in regard to the proof which the plaintiff had offered before the Sub-Registrar about the non-appearance of the executants are foreign to the scope of the suit and any irregularity in these matters or any mistake in regard to these matters in the order of the Sub-Registrar do not make his order or subsequent proceedings on its basis as nullity.

APPEAL AGAIST THE ORDER * OF THE HIGH COURT OF JUDICATURE, DATED 13TH Magh 2000.

PT. LOK NATH SHARMA ADVOCATE—For the Appellant.

CH. INDER DASS VAKIL—For the Respondent.

*Reported as 2 J. & K. L. R. 341.

The judgment of their Lordships was delivered by :—

Hon'ble Pt. Shiam Krishna Dar.—This is an appeal against the judgment and decree dated January 26th, 1944, of the High Court of Judicature, Jammu and Kashmir State, by which it reversed in a second appeal the concurrent judgments and decrees of the District Judge and of the Sub-ordinate Judge, Jammu, in a suit under section 77 of the Registration Act (XXXV of 1977).

On *Katik* 2nd, 1998, two Hindu brothers Baldev Singh and Hari Singh, who died during the pendency of the litigation and are now represented by the respondent, executed a sale-deed in favour of the appellant of an occupancy holding for a consideration of Rs. 600 which was to be paid by the vendee to the vendors at the time of the registration of the deed. On *Katik* 25th, 1998, this deed was presented for registration by an agent of the appellant under a power of attorney ; but the Sub-Registrar of Jammu refused to register the deed on the ground that the agent had no authority under the power of attorney to get the document registered and also on the ground that the State-subject certificate of the appellant did not describe his caste and was thus defective. This order of the Sub-Registrar was set aside in appeal by the Registrar on the ground that the defect in the State-subject certificate had, since the passing of the order by the Sub-Registrar, been removed and that the defect in the power of attorney could be cured by a personal presentation of the document by the appellant as the time for the registration of the document had not expired.

The deed was again presented for registration before the Sub-Registrar of Jammu on 11th *Magh*, 1998, and on the same date the appellant also presented his affidavit before the Sub-Registrar, stating that the executant declined to get the document registered. Relying upon this affidavit the Sub-Registrar passed an order refusing to register the document on the ground "that the vendors refused to get the deed registered". Against this order the appellant made an appeal to the Registrar who came to the conclusion that the appeal was incomplete

because the appellant had by his own affidavit invited the order of refusal from the Sub-Registrar and the document, therefore, could not be registered.

The appellant thereupon raised an action under section 77 of the Registration Act (XXXV of 1977) for a decree directing the document to be registered. This decree was granted to him by the Subordinate Judge Jammu, and it was affirmed on appeal by the District Judge Jammu, but in a second appeal the High Court reversed the two concurrent decrees and dismissed the appellant's suit.

By a joint judgment Wazir and Masud Hasan JJ. have found that on the date when the document was first presented for registration the executants were present in the office of the Sub-Registrar to get the document registered and to receive its consideration and it was only the defective presentation of the document by the appellant which prevented the registration and the consideration being paid to them. They have further expressed the view that when the second presentation of the document was made it was the duty of the appellant to serve a registered notice on the executants to appear before the Sub-Registrar or to take up a process against them under section 34 of the Registration Act and the proof of the fact that the executants were avoiding registration should not have rested upon appellant's affidavit alone and the Sub-Registrar exercised his discretion improperly in accepting the appellant's affidavit and basing his conclusion upon it, and his order of refusing registration on the ground that the executants were avoiding registration was incorrect and it was liable to be questioned in a suit under section 77 of the Registration Act. They have accordingly held that all proceedings including the order of the Sub-Registrar and the Registrar, subsequent to the appellant's affidavit, were mis-conceived and were a nullity and a suit under section 77 was incompetent.

In the opinion of the Board the view taken by the High Court is erroneous and it cannot be supported either in law or on facts. Indeed at the Board's Bar the counsel for the respondent made no endeavour

to support it and he frankly confessed his inability to do so.

The finding of the High Court that the executants were present when the document was first presented for registration is not based upon any evidence and it is the result of a surmise which is thus expressed in their judgment :—

“ because there is nothing to the contrary urged in the course of registration proceedings or in the course of this suit.”

The order of the Sub-Registrar passed on the date when the document was first presented contains a statement of the appellant's agent to the effect that the executants were avoiding the registration of the document. It is difficult to see how such a statement could have been made by the agent and accepted by the Sub-Registrar if the executants were in fact present before the Sub-Registrar and were willing to register the document. It is still more difficult to see that if the executants were in fact present why the document was not originally presented by them or even if for some reason the document was not originally presented by them why the defective presentation of the document by the agent was not set right by the executants by presenting the document themselves. The finding of the High Court thus is without any evidence to support it, it is in conflict with the statement of the appellant's agent as contained in the Sub-Registrar's order and it is opposed to all the probabilities of the case. And indeed before the Board this fact was not disputed that the executants at all material times were avoiding to get the document registered. Once this conclusion is reached the entire basis of the High Court reasoning falls to the ground.

• But even if it be assumed that the executants were present at the registration when the document was first presented, and at the second presentation the appellant did not give proper proof of the avoidance of the registration by the executants and that the order of the Sub-Registrar was incorrect it does not follow that that order or subsequent proceedings

and order were nullity and the suit under section 77 was incompetent.

No doubt it was open to the Sub-Registrar to pass a different order; he could have directed the appellants to furnish better proof or he could have treated non-appearance of the executants as the denial of execution. But rightly or wrongly he refused to register the document on the sole ground that the executants refused to get the document registered. In the form in which the order was expressed the appellant's only remedy was to make an appeal under section 72 to the Registrar, which they in fact made.

In the appeal before the Registrar, here again it was open to the Registrar to pass a different order. He could have called upon the appellant to give better proof of the executants' avoiding registration or he could have treated their avoidance as denial of the execution and directed the appellant to proceed on that footing. But he did not do so and he refused registration solely on the ground that the appeal to him was incompetent, as the appellant had invited from the Sub-Registrar the order of refusal and he had no right to complain against such an order. It is obvious that the view taken by the Registrar was wholly unsound. In the events that had happened the document could only be registered by the Registrar and not by the Sub-Registrar and to get the document registered by the Registrar it was necessary for the appellant first to get the refusal of the Sub-Registrar as a step to take the matter to the Registrar under section 72 or 73, as the case might be, of the Registration Act. And in the form in which the order was passed by the Sub-Registrar the only course left open to the appellant was to move the Registrar under section 72 of the Registration Act.

The scope of enquiry in a suit under section 77 of the Registration Act is limited and well settled. The plaintiff in such a suit has to establish a valid presentation of the document for registration within the time prescribed as also the refusal by the Sub-Registrar and also by the Registrar, under section 72

or 76 of the Registration Act, to register the document on an appeal or application by the plaintiff within the time prescribed; he is also required to bring the suit within the prescribed time. But if these conditions are fulfilled and the execution of the document is admitted, as it was in this case, any enquiry in regard to the passing of the consideration of the document, on which the courts below embarked, or any enquiry in regard to the proof which the plaintiff had offered before the Sub-Registrar about the non-appearance of the executants on which the High Court based its judgment, are foreign to the scope of the suit and any irregularity in these matters or any mistake in regard to these matters in the order of the Sub-Registrar do not make his order or subsequent proceedings taken on its basis as a nullity. Nor do they make an action under section 77 incompetent.

The Board will humbly advise His Highness that this appeal be allowed with costs here and in the High Court and that the decree of the High Court be set aside and that the decrees of the District Judge Jammu and of the Subordinate Judge Jammu, be restored.

Board of Judicial Advisers.

Before the Hon'ble Chowdhary Niamat Ullah, President,
the Hon'ble Dr. Prosanto Kumar Sen,

and

the Hon'ble Pt. Shiam Krishna Dar.

1945.

July 10

2002.

CRIMINAL APPEAL No. 1 OF 1945.

Har 7th

PT. PREM NATH BAZAZ—APPELLANT.

versus

STATE—RESPONDENT.

(1) *Press and Publications Act* (1 of 1989) *Section 10 (1) (d), (e) and (f)*—*Ranmir Penal Code (Act X of 1989)*—*Sections 124-A and 153-A*—*Gravamen of charges both under the Press and Publication Act,*

1989 and the Ranbir Penal Code, 1989 is the same i. e. endeavour to promote public disorder and disturb public tranquility.

The provisions of clauses (d), (e) and (f) of sub-section (1) of section 10 of the Press and Publications Act are almost word for word the same as those laid down in section 124-A and section 153-A of the Ranbir Penal Code. The gravamen of the charges under which security is required to be deposited from the printer or publisher of a newspaper under the Press and Publications Act is the same as that under section 124-A and section 153-A of the Penal Code. Though the two sections of the Penal Code have been put in two different classes, the real gist of the offence of sedition as well as that of exciting class hatred is the same, namely its tendency to disturb public tranquility. The intent of the legislature must be gathered from the plain words of the sections and in their accepted meaning in judicial pronouncement.

11 Cox Cr. Cases 59, A. I. R. 1942 Fed. Court 22, I. L. R. 36 Cal. 44 I. L. R. 22 Bom. 149, I. L. R. 39 Mad. 1085.

(2) Press and Publications Act (1 of 1989)- section 10 (1) (d) and (e)- Attack in the article directed against some persons in the Government-Will it amount to attack on the Government or on those persons—This depends upon the context of article and its effect on the mind of the average man.

When the attack is directed against some persons in the Government who in the opinion of the writer are not loyally serving the Government and who, by their action or inaction, are throwing the Government into disrepute and sowing the seeds of mischief, is it to be necessarily taken to be attack on the Government or may it not rather be read as an attack on the persons above mentioned so as to induce them to mend their ways and thus leave no room for disaffection on the part of the general body of citizens? This would turn on the context and on a careful consideration of the question as to what would be the real effect of the article taken as a whole and on a natural interpretation of the words employed on the mind of the average man.

8. B. L. R. 421, I. L. R. 39 Mad. 1156 and A. I. R. 1919 P. C. 36 referred to,

(3) Press and Publications Act (1 of 1989)-Section 10 (1) what other factors to be considered in judging an article besides the article itself.

While the freedom of press is a valued privilege of the citizen, there are other factors that must also be considered, in coming to a conclusion as to where to draw the line between freedom and licence. The state of society the time and circumstances, the amount of latitude in the matter of criticism that may be permissible, having regard to the kind or class of persons who may read the articles, -all these should enter into the determination of the question as to whether the right to freedom of expression vested in the citizen has been rightly and judicially exercised or whether it has transgressed the limit.

(4) Press and Publications Act (1 of 1989) -Section 10 (1) - Article to be read as a whole-Mere abusive epithets, declamations, invectives, turbid language not necessarily condemnable-Real intention and spirit of the article to be looked into.

An article should be dealt with in a fair and liberal spirit not picking out an objectionable sentence here or a strong word there or giving an undue importance to inflated or turbid language-but looking at the real intention and spirit of the article (11 Cox Cr. Ca. 59, 14 Cal. 36). It is also to be remembered that mere abusive epithets, declamations, invectives, turbid language will not necessarily bring the writing under condemnation. What really counts is whether on a perusal of the articles as a whole one can come to the conclusion that they have the tendency to create a feeling of hatred or contempt or disaffection against the Government, established by law, in the mind of the ordinary average man who reads the newspaper.

(5) Press and Publications Act (1 of 1989)- Section 10 (1) (f) Meaning of the word "classes" explained.

When the persons that comprise a particular group are not clearly ascertainable, or when the group mark is shifting and changeable, it is scarcely possible that any criticism of such changeful or changeable group can lead to breach of tranquility.

Expression such as "Editors' Conference", "Journalists' conference", "reactionary political leaders", "Hindu Capitalists", "National Conference", "Yuvak Sabha leaders" in the article in question represent such mixed and indeterminate bodies that it is difficult to imagine that they constitute "classes" within the meaning of section 10. *A. I. R. 1933 Bom. 65* and *A. I. R. 1940 Bom. 379* referred to.

APPEAL AGAINST THE ORDER OF THE HIGH COURT OF JUDICATURE, DATED 20TH MAGH, 2001.

CH. INDER DASS—For the Appellant.

1ST. ASSTT. TO THE ADVOCATE GENERAL—For the State.

The Judgment of their Lordship was delivered by—

Hon'ble Dr. Prosanto Kumar Sen.—This appeal arises out of proceedings instituted by the Government of Jammu and Kashmir under the provisions of section 14 sub-section (3) of the Press and Publications Act, 1989. The appellant against whom the proceedings were instituted is the Editor, printer and publisher of the Urdu daily "Hamdard" of Srinagar. An order in Council was issued and served on him dated the 9th. September, 1943, which runs as follows :—

"It is hereby ordered that Pt. Prem Nath Bazaz, Publisher of the "Daily Hamdard" Srinagar be required to deposit a security of Rs. 2,000 under sub-section (3) of section 14 of the Jammu and Kashmir Press and Publications Act of 1989, for having published the three articles specified in the notice forming annexure A to this Council Order and that the said notice be served upon him".

The annexure to the Council Order which purported to be the notice in terms of sub-section (3) of Section 14 of the Press and Publications Act, ran as follows :—

"Notice."

"Whereas the Urdu newspaper called the "Daily Hamdard" Srinagar, printed at the Broca

Press Srinagar, and Published by Pandit Prem Nath Bazaz, son of Pt. Kanth Ram Bazaz of Mohalla Chandpura, Srinagar, Published in its issue dated 21st August, 1943, an article under the heading *Sir Maharaj Singh Ke Istifa Ke Vajuhat*, and another article in its issue dated the 24th August, 1943, under the heading *Kaisa Nausherwani Insaf hai*, and another article in its issue dated 28th August, 1943, under the heading *Uzre Gunah Badtar Az Gunah*.

“And whereas it appears to the Government that all the aforesaid three articles contain words which tend directly or indirectly to bring into hatred or contempt, or to excite disaffection towards the Government established by law in this State, and which also tend directly or indirectly to promote feelings of enmity or hatred towards different classes of His Highness the Maharaja Bahadur's subjects ;

“Now, therefore, in exercise of the powers conferred by sub-section (3) of section 14 of the Jammu and Kashmir Press and Publications Act of 1989, the Government are pleased to order that the said Pandit Prem Nath Bazaz son of Pt. Kanth Ram Bazaz, caste Bazaz, resident of Chandpura, Srinagar, publisher of the newspaper “Daily Hamdard”, Srinagar, shall deposit with the District Magistrate, Kashmir, security of the amount of two thousand rupees in money or the equivalent thereof in securities of the Government of India, on or before the 4th. day of Assuj, Samvat 2000.

By order of Government,

(Sd.) HAVELI RAM,

DATED SRINAGAR,
the 9th September, 1943.

Chief Secretary to
His Highness' Government,
Jammu and Kashmir.

It may be mentioned here that the dates of the offending articles given in the notice were not correct. Instead of the 24th. and 28th August, the dates of the second and the third articles should have been given as the 25th and the 27th August respectively. Nothing turns on this error as, admittedly, there was no mistake or difficulty regarding the identification of the three articles which did appear in the issues of the "Herald" dated the 21st, 25th and the 27th August, respectively. The appellant applied to the High Court under the provisions of section 21 of the Act, praying that the order to deposit security under section 14 sub-section (3) be set aside. In paragraph 5 of the said application the defence of the appellant was compendiously set out thus :—

"(5). That the words in the articles with aforementioned headings are (a) healthy comments expressing disapprobation of measures adopted by the Government with a view to obtain their alteration by lawful means (b) comments expressing disapprobation regarding the administration and other actions of some officers, pointing out without malicious intention, and with an honest view to their removal, matters which are producing or have a tendency to produce feeling of enmity or hatred between different classes of His Highness' subjects (c) honest comments with good faith regarding some news about the administration and (d) humble appeal to His Highness to set matters right."

The application was heard by a Special Bench consisting of all the three learned Judges of the High Court, and was dismissed under section 23 sub-clause (3), Masud Hasan J. dissenting. Hence this appeal under special leave granted by His Highness.

A preliminary point had been taken in the High Court as to the character and validity of the notice which initiated the proceedings. It need only be mentioned that this point was also taken before the Board and argued awhile, but ultimately abandoned. The learned advocate for the appellant contended that the notice

served on the appellant was defective and irregular ; the Act provides that the notice must state or describe the offending words, signs or visible representations which in the present case it did not do. The notice mentioned only the headings of the articles and was, therefore, not in accordance with law. In view of the fact that a decision on this point, even though it were in favour of the appellant, would not lay at rest the real subject matter in controversy, and would but afford a temporary respite to the appellant because the proceedings could immediately be revived so as to put him in jeopardy again. The learned advocate appearing for him very properly preferred to abandon the point and proceed to the main argument in the case.

In the course of the hearing the learned Advocate General pointed out to the Special Bench certain passages in the articles which according to him, are objectionable as they tend directly or indirectly to bring into hatred or contempt or to excite disaffection towards the Government established by law in the State ; and certain other passages which tend to promote feelings of enmity or hatred between different classes of His Highness the Maharaja Bahadur's subjects, and invited the High Court to hold that these passages came within the section under which proceedings had been initiated. Sub-section (3) of section 14 of the Press and Publications Act runs as follows :—

“Whenever it appears to the Government that a newspaper published within the territories of the Jammu and Kashmir State, contains any words, signs or visible representations of the nature described in section 10 of sub-section (1), the Government may by notice in writing to the publisher of such newspaper, stating or describing such words, signs or visible representations, require the publisher to deposit with the Magistrate, within whose jurisdiction the newspaper is published, security to such an amount, not being less than 500 or more than 3000 rupees as the Government may think fit to require etc....”

Sub-section (1) of section 10, which indicates that the words, signs or visible representations would become offensive when they tend directly or indirectly :—

- “(d) to bring into hatred or contempt His Highness the Maharaja Bahadur or the Government established by law in this State or the administration of justice or any class or section of His Highness the Maharaja Bahadur's subjects, or to excite disaffection towards His Highness the Maharaja Bahadur or the said Government, or
- (e) to encourage or incite any person to interfere with administration of the law or with the maintenance of law and order or to commit any offence, or
- (f) to promote feelings of enmity or hatred between different classes of His Highness the Maharaja Bahadur's subjects.”

One is to keep in view not only the terms of the above provisions of law but also the spirit underlying them in order to come to a just conclusion as to whether the articles, which are the subject matter of these proceedings, can be said to come within the mischief contemplated by the law. It is to be observed that the provisions, above referred to, are almost word for word the same as those laid down in the Section 124-A and Section 153-A of the Ranbir Penal Code as also in the Jammu and Kashmir Defence Rules, rule 32 read with rule 28, sub-rule (6); also, that the law in force in the State is the same as that of British India. The provisions of law in all the above respects are almost *verbatim* the same with a few necessary local variations in the State. The principles of law underlying sedition are, therefore, the same as those governing the present case.

For the gravamen of the charges under which security is required to be deposited from the printer or publisher of a newspaper under the Press and Publications Act, is the same as that under Section 124-A and Section 153-A of the Penal Code. Though the

two sections of the Penal Code have been put in two different classes-section 124-A in the class "offences against the State" and section 153-A in the class of "offences against public tranquility" the real gist of the offence of sedition as well as that of exciting class-hatred is the same namely, its tendency to disturb public tranquility. The Board can do no better than adopt the comprehensive meaning given to it by Fitzgerald Judge, in one of the earliest cases on the subject :—

"Sedition embraces all those practices, whether by word, deed or writing, which are calculated to disturb the public tranquility of the State and lead ignorant persons to subvert the Government. The objects of sedition generally are to induce discontent, and insurrection, to stir up opposition to the Government, and to bring the administration of justice into contempt, and the very tendency of sedition is to incite the people to insurrection and rebellion. Sedition has been described as disloyalty in action and the law considers as sedition all those practices which have for their object to excite discontent or disaffection, to create public disturbances or to lead to civil war, to bring into hatred or contempt the sovereign or Government, the laws or the constitution of the realm and generally all endeavours to promote public disorder." *

This view has been accepted and emphasised in almost all judicial pronouncements in India and recently by Guryer Chief Justice in the case of *Niharendra Dutt Vs. Emperor* † The earliest case on sedition in India is that of *Queen Empress Vs. Jogendra Chander Bose and others* in which Petheram C. J. in his charge to the jury thus laid down the law :

"If a person uses either spoken or written words calculated to create in the minds of the persons to whom they are addressed a disposition not to obey the lawful authority of the Government or to subvert or resist that

* 11 Cox. Cr. Cases 59.

† A. I. R. 1942 Fed. Ct. 22.

authority, if and when occasion should arise, and if he does so with the intention of creating such a disposition in his hearers or readers he will be guilty of the offence of attempting to excite disaffection within the meaning of the section, though no disturbance is brought about by his words, or any feeling of disaffection in fact produced by them."

Although in that case the learned Chief Justice took the view that anything "contrary to affection" or showing "absence of affection" amounts to disaffection, the point of view from which such attitude of mind or ill-will towards the Government, as evinced by the offending words, signs or visible representations, was to be judged was indicated as above. In the well-known case of *Queen Empress versus Balgangadar Tilak*, Strachey Justice adopted Petherm Chief Justice's definition of "disaffection" to mean "absence of affection", but he added "it means hatred, enmity, dislike, hostility, contempt, and every form of ill-will to the Government." *

Latter, he explained himself more clearly by saying "you cannot take it that I meant an attitude of mere negation from the words which followed, for I said that disaffection meant exciting the people to hate their ruler, that it coupled with the word enmity, means an active feeling". †

The question which arises for consideration is whether in determining liability arising on proceedings under the Press Act, the principles above-mentioned, underlying the offences of sedition (section 124-A) under the Penal Code should be applied. In the opinion of the Board there is no reason why they should not be. The essential words of the sections in the Penal Code and the Press and Publications Act are exactly the same as above pointed out. The intent of the legislature must be gathered from the plain words of the sections and in their accepted meaning in judicial pronouncements. Judging from the terms of section 10, sub-section (1) and the relevant clauses under sub-section (1) it is clear that the legislature had in view the same ingredients as are

* I L R Calcutta. 36 at page 44.

† I L R 22 Bombay, 149.

required for the offences under section 124-A and section 153-A of the Penal Code. This view is well supported by the observations of Gwyer Chief Justice in the case of *Nihirendu Dutt Majumdar V. Emperor* * Speaking of the similarity in terms between the provisions of section 124-A of the Penal Code and those of rule 34 (6) (c) under the Defence of India Act, the Chief Justice of India observes as follows :—

“Sedition is none the less sedition because it is described by a less offensive name and the law relating to the offence of sedition as defined in the Penal Code is equally applicable to the prejudicial act defined in the Defence of India Rules.”

Indeed the same view was taken in one of the earliest cases under the Indian Press Act, *Mrs. Annie Besant V. Emperor* † Abdur Rahim Chief Justice in his Judgment in that case observes :—

“That portion of clause (c) with reference to which the extracts require careful examination is this,” to bring into hatred or contempt His Majesty or the Government established by law in British India.....or any class or section of His Majesty’s subjects in British India or to excite disaffection towards His Majesty or the said Govt..... It will be seen that this lumps together the offences defined by sections 124-A and 153-A of the Indian Penal Code with the difference that we are not concerned here with any question of intention of the editor or writer of the articles.

Again,

By “tendency”, I take it, is meant the natural effect of the words used on the readers of the newspaper in question. I do not think that we ought to have any regard in this connection to the effect which they may possibly

* A. I. R. 1942, Fed. Ct. 22.

† I. L. R. 30 Mad. 1085.

produce in the mind of abnormally constituted persons or persons whose acquaintance with the language is inadequate or those who might content themselves with reading certain passages or expressions apart from the context.....All that we are to take into account is the effect which the words are, by their nature, likely to produce on a normal average reader understanding them in their plain natural meaning."*

There is another aspect touched upon in the case of Mrs. Annie Besant which is germane to the present case. It is this : when the attack is directed against some persons in the Government, who in the opinion of the writer are not loyally serving the Government and who, by their action or inaction, are throwing the Government into disrepute and sowing the seeds of mischief, is it to be necessarily taken to be an attack on the Government itself? Or, may it not rather be read as an attack on the persons above-mentioned, so as to induce them to mend their ways and thus leave no room for dissatisfaction on the part of the general body of citizens? This would turn on the context and on a careful consideration of the question as to what would be the real effect of the article taken as a whole and on a natural interpretation of the words employed on the mind of the ordinary average man. Seshagiri Ayvar J. while dealing with this question quotes with approval the dictum of Batty justice in *Emperor Vs. Bhaskar* † which runs as follows :—

"One particular set of persons may be open to objection, and to assail them and incite hatred against the Government, because they are only individuals, and are not representatives of that abstract conception which is called Government. Individuals come and go, but the Government is supposed to remain.....Changes in policy and changes in measures are liable to criticism and to criticise and urge objections to them is a special right of a free press in a free country.....every liberty is given to all men to express their opinion as long as they do not mis-use or abuse their

* I. L. R., 39 Mad. at pages 1117-1118.

† (1906) 8 B. & L. 1111; 22 B. 439, 441.

power to the injury of others, including, among injuries to others, injury to the State. It is only on that condition that it is possible to have a free press.” *

Seshagiri Ayyar then goes on to make his own observations thus :—

“The demand that there should be alterations in the State is one of those claims which every law-abiding subject interested in the well-being of the Government might legitimately advance. It is the system of Government that section 4(1) (c) contemplates and not the persons who for the time being carry on the details of the administration..... Otherwise, any argument tending to suggest that particular persons are not carrying on the machinery of Government efficiently may be said to incite the people to interfere with the maintenance of law and order. Dissatisfaction with men and measures is believed to be a healthy sign of progress. It is not necessarily incompatible with a desire not to interfere with the administration of the land, or with a maintenance of law and order.” †

The underlying principles of law above dealt with received further elucidation from the Judicial Committee in the same case when it went up in appeal to the Privy Council. Their Lordships, commenting upon section 4, sub-section (1) of the Indian Press Act, and with special reference to explanation II thereunder, made the following observations :—

“The balancing of important political considerations which is effected by adding Explanation 2 to the enacting words, which are found in the earlier part of the section has its analogy in sections 124-A and 153-A of the Indian Penal Code. The language is not precisely the same, but there is the same delicate balancing of two important public considerations, the undesirability of anything tending to excite sedition or to excite strife between classes and the undesirability of preventing any *bona fide* argument for reform.

* I. L. R. 39 Mad. pp. 1155-5.

† I. L. R. 39 Madras, pp. 1156-57.

In applying these balancing principles it is inevitable that different minds may come to different results, one mind attaching more weight to the consideration of freedom of argument, and the other to the preservation of law and order or of harmony.

The section 124-A of the Indian Penal Code has been the subject of careful consideration in the cases of *Queen Empress Vs. Bal Gangadhar Tilak* and *Bal Gangadhar Tilak Vs. Queen Empress* (in which case this Board refused leave to appeal) see *Bal Gangadhar Tilak Vs. Queen Empress*, *Queen Empress Vs. Ramchandra Narayan* and *Queen Empress Vs. Amba Prashad* and though as already stated the language of this section is not precisely the same as the language in the press Act, these judgments are of considerable assistance towards the construction of section 4.

In substance the question under clause (c) of section 4, sub-section (1), comes to this; are the passages such as in fact to excite, or do they disclose an attempt (which implies intention) to excite, hatred, contempt or disaffection towards the Government or of any class or section of His Majesty's subjects in India; and in judging the question of intent the publisher must be deemed to intend that which is the natural result of the words used having regard, among other things, to the character and description of that part of the public who are to be expected to read the articles." (x)

In judging of the character of the articles complained of in the present case it would be well to keep in view the principles above-mentioned. While the freedom of the press is a valued privilege of the citizen, there are other factors that must also be considered, in coming to a conclusion as to where to draw the line between freedom and license. The state of society, the time and circumstances, the amount of latitude in the matter of criticism that may be permissible, having regard to the kind or

x A. I. R. 1919 P. C. 31 at pages 36-38.

class of persons who may read the articles, all these should enter into the determination of the question as to whether the right to freedom of expression vested in the citizen has been rightly and judiciously exercised or whether it has transgressed the limit. As Gwyer Chief Justice puts it :—

“The words as well as the acts which tend to endanger society”, it has been observed, “differ from time to time in proportion as society is stable and insecure in fact, or is believed by its reasonable members to be open to assault. In the present day meetings and processions are held lawful which 150 years ago would have been deemed seditious and this is not because the law is weaker, or has changed, society is stronger than before.” (Lord Sumner in (1917) A. C. 406 at page 466). The right of every organized society to protect itself against attempts to overthrow it cannot be denied; but the attempt which have seemed grave in one age may be the subject of ridicule in another. Lord Holt was a wise and great Judge, but he saw nothing absurd in saying that no Government could subsist if men could not be called to account for possessing the people with an ill opinion of the Government, since it was necessary for every Government that the people should have a good opinion of it.” *

In considering the articles in question in the light of the above judicial pronouncements, it is necessary to remember the words of Fitz Gerald J. in *Reg. Vs. Sullivan* that they should be dealt with “in a fair and liberal spirit not picking out an objectionable sentence here or a strong word there or giving an undue importance to inflated and turbid language but looking at the real intention and spirit of the article.” (11 Cox Cr. Ca. 59, 14 Cal. 36 page 41). It is also to be remembered that mere abusive epithets, declamations, invectives, turbid language will not necessarily bring the writing in question under

condemnation. What really counts is whether on a perusal of the articles as a whole one can come to the conclusion that they have the tendency to create a feeling of hatred or contempt or disaffection against the Government, established by law, in the mind of the ordinary average man who reads the newspaper.

The first article appearing in the "Hamdard" of 21st August, 1943, is under the caption; "*Sir Maharaja Singh Ke Istefa Ke wajihat.*" Three passages in this article have been considered as coming within the scope of section 10 clause (1). They have been held by the learned Chief Justice to contain observations in which the Government has been accused (1) of stifling the voice of the public (2) of its internal condition being unsound (3) of being incompetent, narrow-minded, reactionery and lacking in foresight." In the judgment of Wazir J. also one or more of these passages have been referred to as being of the nature described in section 10 clause (1). It is, therefore, necessary for the Board to examine these and other passages in their context. In this article Sir Maharaj Singh is set up as a popular hero whose resignation, within three months of his acceptance of office, has caused great disappointment to the subjects of the State. The writer has used words such as "democratic Prime Minister", his "democratic activities", and the like, freely throughout the article while referring to him; and the words "reactioneries", "public enemies", "disloyal to the State" etc., while referring to certain un-named people who, he supposes, were the cause of his resignation. The writer complains that the grounds of his resignation should have been made public, that only two parties were aware of such grounds, namely, Sir Maharaj Singh himself and the Kashmir Government; but both had kept silent. Consequently, all manner of unauthorised news which had "an element of irresponsibility" were being published outside the State". This is followed by an illustration of one such irresponsible writing which has appeared in a newspaper published outside the State. The writer then observes with appreciation that the Kashmir Government rightly contradicted this news at once and declared it to be unfounded. As for Sir Maharaj Singh, he had kept silent so long as he was within the State but afterwards at Lahore "freeing himself from the strangulating atmosphere of

the State, he released a statement at Lahore as to why he resigned the post of Premier." A few lines lower down, the writer explains what he means by "strangling atmosphere" thus :—

"Obviously so long as Sir Maharaj Singh was here as Prime Minister, or afterwards as State guest, he could not disclose the reasons of his resignation." From the above it seems clear that all that the writer means to convey is that from a sense of delicacy the ex-premier did not feel free to disclose the reasons of his resignation as long as he was in Kashmir. On a careful reading of the article therefore, it appears to the Board that this does not amount to accusing the Government of stifling the voice of the public.

Regarding the second passage again we have to read it in its context. The writer says that Sir Maharaj Singh's statement "provides the public with an opportunity for a responsible discussion of this matter". He expresses his appreciation of Sir Maharaj Singh's acknowledgement that "His Highness is a capable ruler and his views are progressive". "This", he observes, "puts a seal for ever on the lips of those who used to say that His Highness the Maharaja Bahadur has become an obstacle in the path of democratic activities of Sir Maharaj Singh." What then could have led to his resignation? The writer attributes it to certain un-named people in the State whom he characterises thus ; "In the State politics there were many elements which had determined to make his schemes and programmes a failure." These, in his opinion, are "disloyal to the State", because they have "forced the most capable and progressive Prime Minister to resign and thus perpetrated an atrocity on democracy". He concludes by saying "that all this proves that the internal condition of Kashmir Government is not good." Whether such allegations are well-founded or not, is not for this Board to consider. It suffices to say that in the context the passages to which objection has been taken cannot be said to have a tendency to cause hatred or contempt or disaffection against the Government. Rightly or wrongly, the writer of the article suggests that there are certain people in the State who do not serve it loyally and whose activities are detrimental to the true welfare or progress of the State.

His attack is directed against these persons whoever they may be. It can hardly be taken to have been directed against the Government established by law.

The third mentioned passage appears to be more serious from one point of view in as much as the Administration has been described therein as "inefficient, narrow-minded, short-sighted and reactionery." It almost comes near the boarder-line but here, again, the context being considered it is difficult to hold that it has actually crossed the border. On a free and fair consideration of the whole article the conclusion that commands itself to the Board is that it refers to what the writer describes as the "reactionery element" in the Administration, which has tendency to set at naught all its beneficent programmes.

Coming now to the other two articles, they have been held to be objectionable, in the words of the learned Chief Justice, for containing passages "accusing the Government of communalism, partisanship, differential treatment and discrimination between Hindus and Muslims."

The second article is entitled "*Kaisa Nausherwani insaf Hai.*" It opens with the observation that the District Magistrate Kashmir had issued an order under section 50 of the Jammu and Kashmir Defence Rules to the effect that without his permission no procession could be taken out, and no meeting could be held, in or within a radius of 10 miles of Srinagar. It goes on to say that "this order was disliked in democratic circles, but that in any case, as the Administration considered it proper to keep this order in force in spite of the universal protests from the public, the impression was that it would be applied to every party and community. But the facts have falsified this notion." These observations are sought to be supported by certain allegations that the District Magistrate had rigorously enforced the restrictions imposed by the order upon the Jammu and Kashmir Muslim Conference who were holding their session, but that in the matter of the Conference of Journalists, which was held at or about the same time, these restrictions were not enforced. The result was that the Jammu and Kashmir Muslim Conference could not carry on

their proceedings under the shadow of the order passed, they only met and, by way of protest, closed the session on the very first day. It is also stated in the article that in order to carry out the terms of the order to the effect that no non-State subject should deliver a speech or participate in the conference, the District Magistrate banned the entry into Kashmir of a non-State subject who was to attend it but that in respect of the journalist's Conference this restriction was not insisted upon in fact, non-State subjects were allowed to participate and a non-State subject was even allowed to preside over the meeting. Then the writer proceeds to observe that the District Magistrate ought to have realised that, at least to prove his impartiality before the world, he should not have practised such a "dual policy". So far the second article may be considered to be innocuous but then the writer, towards the close, works himself up to a climax and directs his artillery of invective against what he calls the Kashmir Administration and adds; "But the Kashmir Administration has passed that stage at which it should have felt that it is good to prove its impartiality in the eyes of the world." Again, "we do not know whether the District Magistrate alone is solely responsible for this policy or the Kashmir Administration as well. But we consider that we should advise the Administration, in the interest of betterment, welfare and progress of the State, that its partial attitude is dangerous because it is likely to create disorder".

It will be convenient to take the third article along with the second. This relates to the same subject as the last. Only, it enters into greater details as to the grievances. The article appears under the Caption; "*Uzri Gunah Buṭtur Az Gunah.*" It returns to the charge against the District Magistrate saying that he had displayed a spirit of partiality and favouritism in enforcing the restrictions imposed by his order under the Jammu and Kashmir Defence Rules. The reason given for such partiality is that "The first party (the Muslim Conference) represents those Muslims whose politics was generally not liked by Hindu officials, and the second party (Editors' Conference) was being backed by those representatives of reactionary political leaders and Hindu capitalists whose politics is liked by Hindu officials. We do not support the creed, policy or the

political programme of the Muslim Conference but equity demands that it should be exposed; such partiality is intolerable." Towards the latter portion of the article one or two other instances are given of such alleged partiality on the part of the District Magistrate. The article winds up with an exhortation addressed to His Highness the Maharaja Bahadur to direct his personal attention to the grievances above-mentioned.

The question to be considered now is whether on a reading of the articles in their entirety, and the particular passages pointed out by the learned Advocate General in their context, the latter tend directly or indirectly (1) to bring into hatred or contempt, or to excite disaffection towards the Government established by law in this State or (2) to promote feelings of enmity or hatred between different classes of His Highness the Maharaja Bahadur's subjects. The learned Chief Justice and Wazir J. have held that on both counts the passages taken exception to come within the mischief of section 10 (1) of the Press and Publications Act. Enough has been said above, with reference to the aforesaid passages read in their context to show that though the passages complained of indulge in denunciations couched in stock phrases which have unfortunately become the common currency of political controversy, they do not, in the light of the principles enunciated above, amount to sedition or exciting class hatred and strife; and in that view they cannot be said to be of the nature described in section 10 (1). The two learned Judges of the High Court have relied on recent judicial decisions. One of them is the *Mariben Liladhur Kara Vs. Emperor* * and the other that of *Narayan Vasudev Phadke V. Emperor* †. The principle enunciated in these two cases is not at variance with those which have been laid down in the well known judicial pronouncements referred to above. Each case is governed by its own facts and circumstances and each piece of writing has to be examined on its own merits. It is sufficient to say that the offending words in these cases were of an entirely different character from the second count, the above two Bombay decisions lay down a very useful proposition. Beaumont Chief Justice observes :—

* A. I. R. 1933 Bombay, 65 at page 67.

† A. I. R. 1940 Bombay, 379 at page 380.

“Any definite and ascertainable class of His Majesty’s subjects will come within the meaning of section 153-A, although the classes may not be divided on racial and religious grounds The word “capitalist” is altogether too vague to denote a definite and ascertainable class so as to come within section 153-A” *

Nanavati J. elucidates the point further :—

“The first and most important ingredient in the connotation of the term “classes” is that the words used must point to a well-defined and readily ascertained group of His Majesty’s subjects. Secondly, some element of permanence or stability in the group will have to be present before one can have an attempt to excite enmity against that group. Thirdly, there is the question of numbers. The group indicated must be sufficiently numerous and widespread to be designated a class.” (2) †

The underlying principle in the above proposition should be obvious. The object of section 153-A of the Penal Code as well as of section 10 (1) (g) of the Press and Publications Act is to prevent breaches of public tranquility that might result from exciting feelings of enmity between different classes of His Majesty’s subjects. But when persons that comprise a particular group are not clearly ascertainable or when the group-mark is shifting and changeable, it is scarcely possible that any criticism of such changeful or changeable group can lead to breach of tranquility. It was on this ground that in *Maniben Liladhur Karu’s* case it was held that the word “capitalist” cannot be said to signify a “class” within the meaning of the section. A similar view was taken in the case of *Narayan Vasudev Phadke* ‡ of the word “Sawkars” or “Landlords” and it was held that they do not come within the meaning of “classes”. In the present case expressions such as “Editors’ Conference”, “Journalists’ Conference”, “reactionary political leaders”, “Hindu Capitalists”, “National Conference” and “Yuvak Sabha leaders” etc. have been piled up in the second and the third articles, but they represent

* A. I. R. 1933 Bombay pages 66 and 67.

† A. I. R. 1933 Bombay page 69.

‡ A. I. R. 1940 Bombay 379.

such mixed and indeterminate bodies that it is difficult to imagine that they constitute "classes" within the meaning of the sections in question.

Several other judicial decisions of different High Courts all coming after the case of *Niharendu Dutt V. Emperor* * and following the principle laid down therein have been cited at the Bar before the Board. Most of them are cases under the Defence of India Rules and lay down no new principle of law. *Emperor Vs. Sadashiv Nariayan Bhaleras*, † *Mufti Fakhrul Islam Vs. Emperor* ‡ *Nabakrishna Chowdhary Vs. Emperor* § *Gopal Narain Seksena Vs. Emperor* || are cases of that description. But there is one case under the Press (Emergency and Powers) Act, 1931, *R. P. Dube. Publisher Nagpur Times' Vs. Emperor* * which may be referred to. In that case the Special Bench of the Nagpur High Court held that the words complained of came so clearly within the mischief of the section that the learned Judges had no option but to dismiss the application.

The Board have given the matter their most careful consideration and have come to the conclusion that the three articles which are the subject matter of the present proceedings are, in respect of the terms and phrases employed by the writer, objectionable, indiscreet and irresponsible. At places they come near the danger zone and the writer, printer and publisher of the articles has enough reason to take caution in future. The Board, however, are unable to hold that the writings in question indubitably constitute offensive matter within the meaning of sub-section (1) of section 10 of the Press and Publications Act of 1939 such as would justify a demand for security under the provisions of sub-section (3) of section 14 thereof, in any event, the case being on the border line the Board would give the editor, printer and publisher the benefit of the doubt. The Board would, therefore, humbly advise His Highness to set aside the decision of the Special Bench and to order that the proceedings taken

* A. I. D. 1042 Fed. Ct. 270.

† A. T. R. 1044 Bom. 255.

‡ A. I. R. 1043 All. 244.

§ A. I. R. 1043 Pat. 418.

|| A. I. R. 1043 Oudh. 217.

* A. I. R. 1044 Nag. 178.

by the Government against Pandit Premnath Bazaz, editor, printer and publisher of the daily "Hamdard" under section 14 (3) of the Press and Publications Act, 1989, be set aside and the security, if any deposited, be refunded to him.

Board of Judicial Advisors.

1945 Before the Hon'ble Chowdhary Niamat Ullah, President
 the Hon'ble Dr. Prosanto Kumar sen,
 July 12 and
 the Hon'ble Pt. Shiam Krishna Dar,
 2002
 Har 29

KH. AMMA KALLA AND ANOTHER.

Versus

AMIR-UD-DIN AND OTHERS.

CIVIL APPEAL No. 17 OF 1945.

Right of Prior Purchase Act (II of 1993)—Section 14 Acquisition by vendee during pendency of suit not effective.

An acquisition by a vendee during the pendency of a suit under the Right of Prior Purchase Act cannot affect the rights of the plaintiff which arose before the institution of the suit.

APPEAL AGAINST THE ORDER OF THE HIGH COURT OF JUDICATURE DATED 9TH POH, 2000.

Pt. AMAR NATH KAK—For the Appellants.

Ch. INDER DASS, VAKIL,—For the Respondents.

The Judgment of their Lordship was delivered by—

Hon'ble Pt. Shiam Krishna Dar.—This is an appeal against the judgment and decree of the High Court of Judicature Jammu and Kashmir dated 9th Poh,

2000, by which it affirmed the Judgment and decree of the City Judge of Jammu, dated Sawan 25, 2000.

On Katik 17, 1984, the respondents 8 and 9 executed a usufructuary mortgage of a house situate at Reasi for a sum of Rs. 1,500 in favour of the appellants and on Assuj 14, 1996, they executed a sale deed of the equity of redemption of the said house in favour of appellants for a sum of Rs. 590.

Treating the possessory mortgage as having merged in the purchase of equity of redemption the respondents 1 to 7 who own a house contiguous to the house which was the subject of the mortgage and sale, instituted a suit to enforce their right of prior purchase under section 15, clause 6 of the Right of Prior Purchase Act, 1993. The said respondent alleged that after the sale the vendees had appropriated certain building material of the value of Rs. 252 to their use, and deducting this sum from the sale consideration they offered to pay Rs. 1748 to the appellants for the above mortgage and sale and on that payment claimed possession of the property.

The appellants did not dispute as a fact the merger of the mortgage in the sale; they pleaded that a larger sum than offered by the said respondents was due to them on the mortgage. They further pleaded that by virtue of acquisition made by them during the pendency of the suit the appellants had also become owners of a contiguous property and the claim for preemption was not maintainable against them.

The trial Judge found that the property acquired by the appellants did not adjoin the property which was the subject of prior purchase as a lane intervened between them. He further found that a sum of Rs. 3401/13/ was due to the appellants on their prior mortgage and for the consideration of the sale of the equity of redemption and in the result he granted a decree to the respondents for possession of the property by right of prior purchase on the payment of the above sum within one month.

Appeals were made against this decree to the High Court both by the appellants and the respondents and in addition to matters which were in controversy in the trial Court a fresh contention was advanced by the

appellants in the High Court, namely, that the right of prior purchase only arises in relation to a sale and not in relation to a mortgage and that respondents were entitled to a decree for possession of equity of redemption only and not for possession of the property. This contention of the appellants as also other contentions of the appellants and the respondents were not accepted by the High Court in their respective appeals and the decree of the trial Judge was affirmed in its entirety.

Before the Board two contentions were advanced by the appellants ; firstly, it was contended that the possessory mortgage and the purchase of the equity of redemption were two separate and independent transactions for independent consideration and no merger took place in law because it was for the benefit of the appellants to keep the mortgage alive and as section 4 of the Right of Prior Purchase Act, 1993, gives a right of prior purchase in relation to sales only and not in relation to mortgages the respondents were not entitled to a decree for possession of the property but they were only entitled to a decree for equity of redemption and they would recover possession of the property only by a separate suit for redemption.

Secondly, it was contended that the acquisition made by the appellants during the pendency of the litigation was of the contiguous property and the finding of fact arrived at by the Courts below was erroneous.

In the opinion of the Board it is not necessary to express any opinion on the question of law whether as a result of the purchase of the equity of redemption a merger of the mortgage took place or not. The plaint in the suit proceeded on the assumption that the mortgage had merged and this assumption was not challenged by the appellants ; indeed they themselves proceeded on the assumption that merger had taken place and they claimed that an account of the mortgage transaction be taken and whatever sum was due on mortgage should be adjudged to them and the trial Court on these pleadings investigated the accounts and awarded to the appellants the sum which was due to them on both transactions. The appellants cannot now turn round and demand that all these proceedings which they themselves invited should now be set aside and the

controversy should be left at large for determination in a future suit.

The second contention of the appellants is concluded by a recent decision of the Board in which it was held that an acquisition by a vendee during the pendency of a suit under Prior Purchase Act, cannot affect the rights of the plaintiff which arose before the institution of the suit and in this view of the matter it is not necessary to discuss the finding of the fact arrived at by the Courts below on the question of the appellants' acquisition.

The Board will, therefore, humbly advise His Highness that this appeal be dismissed with costs.

Board of Judicial Advisors.

Before the Hon'ble Chowdhary Niamat Ullah, President, 1945
the Hon'ble Dr. Prosanto Kumar Sen.

and

the Hon'ble Pt. Shiam Krishna Dar.

July 10.

2002

KRIPA—PETITIONER.

Versus

R. B. TH. KARTAR SINGH AND OTHERS—
 —OPPOSITE-PARTY.

Har 27.

APPLICATION FOR SPECIAL LEAVE TO APPEAL NO. 9
 OF 1945.

*Appeal to His Highness' Act (XV of 1996)—
 Section 5—Value of subject-matter—Duty of the High
 Court.*

*If a petition alleges before the High Court that the
 value of the subject matter of the original suit and of the
 proposed appeal is more than Rs. 2,500, the High Court
 is bound to take notice of such allegation under section 5
 of the Appeals to His Highness' Act, 1996.*

L. SUNDER LAL, ADVOCATE—For the Petitioner.

L. SATYAPAL VOHRA, ADVOCATE—For the Opposite-
 PARTY

The judgment of their Lordship was delivered by:—

Hon'ble Chowdhary Niamat Ullah—This is a petition for special leave to appeal on the allegation that the value of the subject matter of the original suit and of the proposed appeal to His Highness is more than Rs. 2,500 and that the appeal is of right. The High Court refused leave without inquiring into the petitioner's allegation made before it that the value of the subject matter of the original suit and of the proposed appeal is more than Rs. 2,500. It is not denied that such an allegation was made by the petitioner before the High Court which did not take any notice of it as it was bound to do under section 5 of the Appeals to His Highness' Act. In these circumstances the Board humbly advise His Highness to set aside the order of the High Court refusing leave to appeal and to direct it to proceed according to law with special reference to section 5 of the Appeals to His Highness' Act.

Board of Judicial Advisors.

1945
— — — Before the Hon'ble Chowdhary Niamat Ullah, President,
July 11.

the Hon'ble Dr. Prosanto Kumar Sen,
and

the Hon'ble Pt. Shiam Krishna Dar.

2002
— — —
Har 28.

GHULAM-UD-DIN AND OTHERS—APPELLANTS.

Versus

HAJI ABDUL RAZAK KENG AND OTHERS—
RESPONDENTS.

CIVIL APPEAL NO. 16 OF 1944.

(1) *Evidence Act (XIII of 1977)—Section 92*
Proviso 2—Exclusion of evidence by oral agreement—
The existence of any separate oral evidence for some
special service to be rendered on which document is silent
and which is not inconsistent with its term, may be
proved by oral evidence.

(2) *Transfer of Property Act (XLII of 1977)—*
Section 54—Agreement for sale to be signed by both
parties.

Agreement for sale is not valid and binding if it is not signed by both parties.

APPEAL AGAINST THE ORDER OF THE HIGH COURT OF JUDICATURE DATED 17TH BHADON 2000.

PT. LOK NATH SHARMA, ADVOCATE—For the Appellants.

PT. AMAR NATH KAK, ADVOCATE—For the respondents.

The judgment of their Lordship was delivered by :—

Hon'ble Dr. Prosanto Kumar Sen.—This appeal arises out of a suit instituted by the plaintiff-respondent for recovery of Rs. 3000. The plaintiff's case is that the defendants 1 and 2 and *Must.* Khursha Bibi deceased, sons and daughter respectively of Subhan Joo, who were the owners of a house situated on the Bund at Srinagar, entered into an agreement with the plaintiffs on 21st Phagan, 1995 (4th March, 1938) for sale of half of the house and the rights of *wasidari* of the remaining half for a consideration of Rs. 25,000. At the date of the agreement the property stood mortgaged to Lala Durga Das of Ganju House for Rs. 21,636-4-6. The arrangement was that this mortgage debt, as well as other debts of the defendants, was to be paid off by the plaintiff and the amounts so paid were to be credited towards the consideration of Rs. 25,000. It is common ground now that the following payments were made by the plaintiff,—Rs. 1,000 paid as earnest money, Rs. 655 paid to Arjun Dev Ganju of Ganju House to release the gold ornaments belonging to the defendants which had been lying pawned with him—these gold ornaments were retained by the plaintiff pending the adjustment of account to be made later—Rs. 21,636-4-6 mortgage money paid to Lala Durga Das ; Rs. 2,500 paid to the Muslim Bank and Rs. 1,500 to Sarwanand in liquidation of debts due to them from the defendants ; Rs. 174-8-0 to Khizar But ; and Rs. 82-9-0 paid to the defendants, within which it is now conceded by the plaintiff, was included Rs. 75 payable to Munshi Asadullah. These make a total of Rs. 27,548-5-6. Crediting the sum of Rs. 25,000 towards consideration

for sale of the property there remains the sum of Rs. 2,548-5-6, which, according to the plaintiffs is payable to him; and he claims in addition Rs. 376-10-6 as compensation for loss and damage suffered by him owing to the failure of the defendants to execute and get the deed of sale registered and to deliver possession of the property within three months as undertaken by them under the agreement of sale dated the 21st Phagan 1995. It may be mentioned that the dispute relates to Rs. 1,000 out of the sum of Rs. 2,548-5-6, claimed by the plaintiff and to the damages claimed. In order to understand the matter in dispute between the parties it is necessary here to state a few facts subsequent to the date of the agreement. It appears that the defendants 1 and 2 were minors at the date of the agreement and *Must. Khursha Bibi* was a *Purdhanishin* woman. They wanted to resile from the agreement on the alleged ground that the document had been got executed under circumstances of fraud and undue influence. They refused to execute the sale-deed; consequently, the sale was not completed and possession not delivered till after some time. Meanwhile, to enforce completion of the sale the plaintiff instituted criminal proceedings for deceit against the defendants under section 420 of the Penal Code. During the pendency of these criminal proceedings on the 21st Bhadon, 1997 (5th September, 1940) the deed of sale was executed and on the 27th Bhadon 1997, (11th September 1940) the criminal case was compounded and the proceedings terminated by a petition of compromise filed by both parties. The petition stated amongst other things that the accused *i.e.*, the defendants-vendors would execute the deed of sale and would have it duly registered. It also mentioned that for the purpose of sale the application for permission to transfer of *wasidari* had also been submitted to the Nazool Department. In the deed of sale executed on the 21st Bhadon, 1997, it was stated that "the possession of the property has been delivered to the vendee and that the possession of the portion which was not given to the vendee so far has also been handed over."

As observed above, the dispute now centres around Rs. 1,000, which according to the defendants is

payable to them and should, therefore, be deducted from the sum of Rs. 2,548-5-6, claimed by the plaintiff; it also relates to the damages claimed by the plaintiff. As to the sum of Rs. 1,000 the case of the defendant, as set out in paragraph four of the written statement, is as follows:—

The plaintiff had paid before settling accounts Rs. 27,548-5-6, the plaintiff kept in his possession gold ornaments valuing Rs. 3,000 and belonging to the defendants for the sum of Rs. 2,548-5-6 out of the said amount. At the same time the plaintiff executed a receipt for Rs. 548-5-6 and a *Barat* for Rs. 451-10-6 in favour of the defendant No. 1. The plaintiff deposited both these documents with Pt. Shambu Nath petition writer with the condition that the said petition writer would hand over these documents to the defendant No. 1 when the permission for transfer of the Nazool land was obtained. The charge on the gold-ornaments would only be for Rs. 1,548-5-6 after deducting a sum of R. 1,000 of these documents. Pt. Shambu Nath petition writer did not return the two documents to the defendant No. 1 and he was forcibly made to produce them before the Sub-Registrar.”

Thus the defendants' case was stated clearly in his written statement and it was to the effect that on the date that the sale-deed was executed there was a separate agreement between the parties that the defendants would submit an application to the Nazool Department and would help in obtaining the permission for the transfer to the plaintiff; and as consideration for this the plaintiff would pay to the defendants Rs. 1,000. This sum of Rs. 1,000 may be said to have been pre-paid in the form of a receipt for Rs. 548-5-6 and a *Barat* for Rs. 456-10-6 in favour of the defendants and these two documents were placed in the custody of Shambu Nath who acted in the matter somewhat like a stake-holder. The defendant's contention is that in as much as he has done his part of the agreement the sum of Rs. 1,000

should now be taken into consideration ; and the plaintiff's claim reduced to Rs. 1,548-5-6. So far as the evidence on this point goes it is practically one sided. The defendant has himself in his statement spoken to the collateral transaction on which his claim to Rs. 1,000 is based. It is supported by Ghulam Mohd., Qadir But and Arjun Nath the defendant's witnesses. It may be mentioned that Arjun Nath was called by the plaintiff also as his own witness. Shambu Nath turned hostile and did not help the defendants but his evidence discloses that he is a thoroughly unreliable witness. As against all this the plaintiff has made no endeavour whatsoever to call any evidence or to assist the Court in any manner on the question as to whether this Rs. 1,000 is legitimately claimable by him. It was his clear duty to do so having regard to the fact that there was a distinct issue No. 2, which ran as follows:—

“(2) Has the plaintiff agreed to pay Rs. 1,000 besides the consideration of Rs. 25,000 of the sale-deed to the defendants and has the plaintiff executed *Hundi* and receipt for this amount which were deposited with Shambu Nath petition writer?”

The trial Court allowed the sum of Rs. 1,000 in favour of the defendants and passed a decree for Rs. 1,548-5-6 only, with costs, in favour of the plaintiff.

It is, however, noteworthy that in the plaintiff's grounds of appeal to the High Court he makes a significant admission to the effect that there was a separate contract between the parties, laying down certain conditions on performance whereof the defendant would be entitled to obtain the benefit of the receipt and the *Barat* amounting to Rs. 1,000. Paragraph 5 of the grounds ran as follows :—

“The fact on record that the receipt, and the *Barat* were kept in trust with the defendants is not denied. There was a condition agreed upon by the parties in regard to this deposit. The condition between the parties was not acted upon by the defendants. Thus these documents continued to re-

main in trust. The condition of keeping in deposit the documents would have ended if the defendants had performed the condition. As they did not do so, they are not, therefore, entitled to the condition of deposit. The lower Court has granted unnecessary concession to the defendants in crediting in account Rs. 1,000 in favour of the defendants when the defendants did not operate the condition precedent.

Thus the only plea that the plaintiff urged in the grounds against crediting the defendants with the sum of Rs. 1,000 was, that the defendants had not performed the condition and were, therefore, dis-entitled to get the credit. This plea is negatived by the clear finding of the trial Court which held on the evidence that the condition referred to was that the defendants should obtain the sanction of the Revenue authorities to the transfer in favour of the plaintiffs that such permission had been obtained and that the sale-deed was "completed in all respects," and that further "the plaintiff had not adduced any evidence to establish that the deed has not so far been attested by the Revenue Minister." On the question of damages the trial Court found that the plaintiff had not established by any evidence what loss, if any, he had suffered owing to the defendants' conduct and refused to pass any decree. On appeal the High Court held that the agreement to pay Rs. 1,000 in addition to the consideration for the sale would be in contravention of section 92 of the Evidence Act in as much as it would be tantamount to "contradicting, varying, adding to or subtracting" from the terms of the written document by evidence of oral agreement. In this view of the case the High Court held that credit could not be given to the defendants for the sum of Rs. 1,000 as claimed by him. Apparently the attention of the learned Judges of the High Court was not invited to proviso 2 of section 92.

Before the Board the learned counsel for the plaintiff-respondent has argued on the same lines and has urged that the oral agreement, if any, to pay Rs. 1,000 in addition to the consideration, mentioned in the sale-deed, was in effect an attempt to try and

vary the terms of the written document, and would, therefore be invalid. The Board are of opinion that the present case comes clearly within the terms of proviso 2 to section 92 of the Evidence Act. And that the agreement to pay Rs. 1,000 for some special service to be rendered by the defendants was a collateral one and was perfectly valid and binding.

On the question of damages the case of the plaintiff-respondent rests primarily on the terms of the agreement dated 21st Phagan, 1995. The learned counsel for the defendants-appellants has contended that the agreement for sale is not valid and binding inasmuch as it is not signed by both parties as required by section 54 of the Transfer of Property Act. This argument would have been conclusive, but on the other hand it is urged by the learned counsel for the plaintiff-respondent that at no stage in the long protracted proceedings, neither in the trial Court, nor in the appellate Court, was this point raised, namely whether or not the vendee's signature had been obtained on the document; consequently the question was never investigated. The next argument in support of the plaintiffs claim to damages is based on section 74 of the Contract Act, applied to clause 9 of the agreement. Clause 9 provides:—

“If any breach of the said conditions excepting the conditions 6 and 7 is made by the promisors, the promisors shall pay at once to the promisee the advance amount received by them together with Rs.1,000 as damages without any objection of paying it in instalments. Further, if in existence of the said conditions the promisee refuses to accept the execution of the sale-deed, the promisors shall recover the said damages from the promisee.

Turning to clauses 6 and 7 which embody the conditions excepted from the operation of clause 9, above quoted, it is found that they lay down that the defendants shall be liable to pay compensation for any expenditure the plaintiff may have to incur in obtaining the sale-deed executed, in getting possession in getting the sale-deed and the agreement registered, “or in any

other way connected herewith " due to avoidance or evasion by the defendant. It is clear that under the provisions of section 73 of the Contract Act, in order to succeed in his claim for damages it was incumbent upon the plaintiff to prove that loss and damage, if any, he had suffered by reason of the defendants' neglect or refusal to see to the completion of the sale and to the delivery of possession of the property sold to the plaintiff. Having adduced no evidence whatsoever, in proof of it the plaintiff is now relegated to clause 9 of the agreement and to the provisions of section 74 of the Contract Act. Section 74 lays down :—

" When a contract has been broken if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty the party complaining of the breach is entitled whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be the penalty stipulated for."

Now it is to be noted that clause 9 of the agreement upon which section 74 is sought to be applied, expressly excludes from its operation all those specific acts or defaults on the part of the promisors, exhaustively recited in clauses 6 and 7, which would entitle the promisee to compensation. The question, therefore, arises as to what other conceivable act or default on the part of the defendants would constitute breach of contract and would render them liable for damages under the operation of section 74 of the Contract Act. In order to succeed the plaintiff must prove that the " contract has been broken," and that independently of the acts or defaults provable under clauses 6 and 9. This the plaintiff has failed to prove. In the opinion of the Board the plaintiff-respondent is not entitled to any damages.

The Board would, therefore, humbly advise His Highness to allow the appeal with costs, to set

aside the judgment and decree of the High Court and to re-instate the judgment and decree of the Court of first instance.

Board of Judicial Advisors.

1945 Before the Hon'ble Chowdhary Niamat Ullah, President,
 the Hon'ble Dr. Prosanto Kumar Sen,
 July 9. and
 the Hon'ble Pt. Shiam Krishna Dar.

2002 DHARAMARTH TRUST DEPARTMENT—AP-
 Har 26. PELLANT.

Versus
 PT. MANORATH RAM—RESPONDENT.

CIVIL APPEAL NO. II OF 1944.

Religious endowment—"Sankalap" in favour of Guru's son by a pious Hindu lady—Improbability of a previous dedication by the same lady.

In a suit for ejectment, the plaintiff alleged that the house in dispute was dedicated by the Maharani, founder of the temple, to the temple and therefore after the dedication was completed the Maharani was left with no power to make a "sankalap" of the house in favour of the defendant.

Held that dedication was not proved. It was improbable to the last degree that if a pious Hindu lady of Maharani's disposition had already made a gift of the house to the temple, she would cancel the gift thirteen years later and make a fresh gift in favour of another charity.

APPEAL AGAINST THE ORDER OF THE HIGH COURT OF JUDICATURE DATED BAISAKH, 15, 2000.

PT. A. N. KAK ADVOCATE—For the Appellant.
 LALA SUNDER LAL ADVOCATE—For the Res-
 pondent.

The judgment of their Lordship was delivered by :—

Hon'ble Pt. Shiam Krishna Dar.—This is an appeal against a judgment and decree dated Baisakh

15, 2000, of a Division Bench of High Court of Judicature of Jammu and Kashmir State, by which it reversed a judgment and decree dated Poh 28, 1990, of a Single Judge of the said High Court. The appellant is a Department of the Government for the administration of charities, in which is also vested the management of the temple of Rughunathji and of its endowments, situated in Purani Mundi in the city of Jammu. Alleging that the property in suit which consists of a house with four shops and a platform attached to it situated in Purani Mundi, are part of the said endowments, it raised an action for ejectment of the respondent who since Samvat 1982 had been in possession of the property, and had made certain valuable constructions in it; and for a mandatory injunction for demolition of constructions.

The trial Judge Masud Hasan J. decreed the claim, but on appeal Ganga Nath C. J. and Wazir J. dismissed the claim on the ground that the dedication of the property in suit to the temple was not proved and that the claim was barred by the law of limitation.

The temple of Rughunath Ji was founded by the Dowager Shree Maharani Bindraliji in or about Samvat year 1944 and was also endowed by her. On Bhadun 19, 1969, she purchased the property in suit which is situated close to the temple for a sum of Rs. 2,400, by a private treaty, from its then owners. Immediately after this purchase portions of the buildings were let out to tenants; and in the "Qabuliat" executed by them the property was described as owned by the Maharaniji to whom the rent was agreed to be paid, but in one "Qabuliat" dated Chet 4, 1969, executed by one Ganga Ram, out of several which were executed in 1969, it was described as "belonging to Mahant Poshkar Das out of the Haveli owned by Maharani Sabiha Bindrali." In or about 1971, the Maharani went to live at Hardwar and during her absence the property was managed by Poshkar Das who was the Mahant of the temple of Rughunath Ji and the income derived from the property in suit was spent for the purpose of the temple and in the "Qabuliats" executed by the tenants it was variously described as "owned by Mahant Poshkar Das," as "belonging to the temple

of Rani Sahiba," as "attached to *Mandir* of Sri Rughunathji," as "owned by Maharani Sahiba Bindralli Ji and attached to *Mandir* Sri Rughunath Ji."

The Maharani returned from Hardwar in Samvat 1982, and before her return on Magh, 29, 1982, she executed at Hardwar a "*Sankalipnama*" by which she made a complete gift of the property in suit in favour of the respondent who was the son of her "Guru" and was connected with her father's family and was brought up by her from his childhood and for a time acted as her agent. On her return from Hardwar, she put the respondent in possession of the property in suit who since 1982, occupied some portion of the house and let out some portion to tenants, collected its rent and also re-built the house at considerable expense mostly before the litigation and partially during the pendency of litigation. The Maharani died at Jammu on Sawan 4, 1994, corresponding to July, 1937. During the life time of the Maharani, by an order of His Highness contained in the letter of the Minister-in-Waiting dated October, 20, 1933, addressed to the Controller Zenana Deorhi, that officer was directed to assume the management and supervision of the temple and of endowments founded by the Maharani and this order included the temple of Rughunath Ji at Purani Mandi and its endowments. During the course of the management thus assumed the Controller came to the conclusion that the property in suit was also a part of the endowment of the temple of Rughunathji and this conclusion was arrived at partly on the wrong assumption made by the Controller that the title-deeds of 1856 relating to a house at Purani Mandi in the name of Maharani which came in possession of the Controller at the time of his taking charge, applied to the house in dispute, and partly as a result of enquiry which disclosed that the property in suit at one time was attached to the temple. He accordingly submitted a confidential report dated December 1, 1934, to the Minister-in-Waiting for orders in relation to the property in suit including some other property, and the Minister-in-Waiting by a confidential letter dated December 11, 1934, communicated the command of His Highness

which is expressed as follows :—

“ Both houses are attached to the Temple. The present tenants be ejected since they are no longer in service.”

In pursuance of the above order a suit was instituted by the Judicial Minister for ejectment of the respondents on Sawan 8, 1908, in the court of City Judge Jammu. During the pendency of the suit, by an order of His Highness dated April 28, 1936, the management of the temple of Rughunathji and of its endowments was transferred to the appellant and the question of prosecution of the suit against the respondent was also left to the discretion of the appellant. An application was accordingly made by the appellant for substitution of his name in the suit but before it could be disposed of the plaint was returned by the City Judge for want of jurisdiction on Chet 19, 1905. And on Baisakh, 7, 1997, the appellant instituted the present suit.

At the outset it is necessary to determine whether the property in suit was in fact and in law dedicated to the temple. If a valid dedication of a property cannot be established then the appellant, as manager of the temple and its endowments, has no right to eject the respondent, and it will not be necessary to express an opinion on other questions which arise in the case.

The appellant alleges that soon after the house was purchased the Maharani on the occasion of the marriage of Narsinghji, the idol installed in the temple, with Tulsi, dedicated the house to the idol by her word of mouth, and after the dedication was completed the Maharani was left with no power to make a “*Sanklip*” of the house to the respondent and put him in possession and the house, therefore, remained the dedicated property and became a part of the endowments of the temple. Alternatively it contends that even if no previous dedication was made by the Maharani the order of His Highness dated December 11, 1934, referred to above, by its own force dedicates the property to the temple and makes it a part of the endowment and also makes the respondent liable to ejectment.

The actual order of His Highness bearing the signature or seal has not been produced in the case and is not before the Board. The confidential letters of the Controller and of the Minister-in-Waiting in full have not also been produced in the case; only some extracts from these letters have been produced one of which, namely the Minister's contains the order quoted above. That order proceeds upon the assumption that the house had been endowed from before and it directs the ejectment of occupiers of the houses presumably not as an act of the State but in due course of law. The order does not profess by its own force to create an endowment if none had existed from before and it is not possible to read in such an order, which effects the civil rights of His Highness' subjects, any implication which does not clearly arise or which does not necessarily follow from the language used. In the opinion of the Board the said order by its own force cannot establish the dedication of the house to the Temple.

The appellant, therefore, is under necessity to establish the dedication of the house by the Maharani. The evidence in favour of the dedication is that the house was situated close to the Temple which was founded by the Maharani and was endowed by her, that during the absence of Maharani at Hardwar, between 1971--1982, the income of the house was collected by the Manager of the Temple and of its endowment and was applied for the purposes of the Temple; and in some of the "Qabuliat" executed by the tenants of the portions of the building the house was described as attached to the Temple; and four witnesses at the trial have sworn that Rani had made an oral dedication soon after the purchase of the house on the occasion of marriage ceremony of the idol with the Tulsi.

The evidence against the dedication is that there is no contemporaneous document of the dedication and in the "Qabuliat" which follow the purchase, the property was styled as owned by Maharani up to the year 1971 and even during the absence of the Maharani at Hardwar, the description of title in "Qabuliats" was conflicting and was consistent with the private ownership of the Maharani. And last

there is the conduct of the Maharani during the last five years of her life beginning with "Sankalip" followed by possession of the respondent and her tacid support of the respondent's title in the controversy which preceded the suit and during the pendency of the suit so long as she lived.

No doubt the oral evidence in proof of dedication was made by the trial Judge, before whom witnesses were examined and who had an opportunity of observing their demeanour but two of these witnesses have had litigation and bad relations with the respondent. Two others have given hearsay evidence. And the High Court in rejecting their testimony has not only relied upon these circumstances but mainly upon their statement and conduct. The High Court was of opinion that it was improbable to the last degree that if a pious Hindu lady of Maharani's disposition had already made a gift of the house to the idol in Samvat, 1969, when the house was purchased, she would cancel the gift thirteen years later in 1982, and make a fresh gift in favour of another charity.

In the opinion of the Board the finding of the High Court on the question of dedication is correct and no case is made out for disturbing that finding.

The Board will, therefore, humbly advise His Highness that this appeal be dismissed with costs.

Board of Judicial Advisors.

Before the Hon'ble Chowdhary Niamat Ullah, President, 1945
the Hon'ble Dr. Prosanto Kumar Sen,
and
the Hon'ble Pt. Shiam Krishna Dar. July 12.

SARDAR TEJA SINGH.
Versus
 BHULA RAM AND ANOTHER.

2002
 Har 29.

CIVIL APPEAL No. 21 OF 1945.

(1) *Execution of decree—Compromise during execution proceedings—Compromise invalid—Effect on decree.*

An invalid compromise arrived at between the parties under a misapprehension of the law or of facts cannot have the legal effect of extinguishing the decree.

(2) *Limitation Act—(IX of 1995)—Article 182—Execution of decree—Step in aid—Excessive amount claimed --whether application invalid.*

The mere fact that an excessive amount is claimed in execution than what is due to the decree holder would not make the application for execution invalid or not in accordance with law so as not to constitute a step in aid of execution. The test in such a case should be whether the Court could on such an application issue a process of execution.

APPEAL AGAINST THE ORDER OF THE HIGH COURT OF JUDICATURE DATED MAGH 1ST 1999.

PT. LOK NATH SHARMA, ADVOCATE—For the Appellant.
PT. JIA LAL KILAM, ADVOCATE—For the Respondents.

The judgment of their Lordship was delivered by :—

Hon'ble Pt. Shiam Krishna Dar.—This is an appeal against the judgment and decree of the High Court of Judicature Jammu and Kashmir dated Magh 1, 1999, by which it affirmed the judgment and decree of the Subordinate Judge of Jammu, dated Jeth 14, 1999, in an execution case.

On Bhadoon 24, 1985 a decree was made in favour of the respondents against the appellant in a suit under section 10 of the Agriculturists Relief Act. This decree provided for a payment of Rs. 12,000 and certain costs by six monthly instalments of 500 rupees each and carried a future interest at the rate of 6 per cent. The decree also provided that a sum of Rs. 535 shall be payable as court fee by the decree-holder before execution is taken out of the decree.

Default was made in payment of instalments due under this decree and on Maghar 12, 1988, an application was made for execution of the decree by which six instalments aggregating to a sum of Rs. 3,000

were sought to be recovered together with a further sum for interest and costs. On this application a court fee of Rs. 150 was paid by the decree-holder as the proportionate amount of the court fee due on the sum of Rs. 3,000 which was sought to be recovered in execution. On *Sawan* 7, 1989, a compromise was arrived at in the above execution which provided for the payment of a sum of Rs. 13,500 by the judgment-debtor to the decree holders for all claims up to date which sum was to be paid in certain specified instalments and was to carry an interest of 4-8-0 per cent. per annum.

Default was again made in payment of the instalments due under the compromise and on *Sawan* 7, 1990, a fresh application was made for execution. This application proved infructuous. Subsequently between the year 1990 and 1997, five more applications were made for execution of the decree and in the course of these executions on *Chet* 20, 1990, the decree-holders paid a sum of Rs. 385, the balance of the court fee due from them under the directions contained in the decree. Some payments were also certified by the decree-holders as having been received from the judgment-debtor during the course of these executions.

On *Har*, 4, 1998, the respondents made a fresh application for the execution of the decree and to this execution two objections were taken by the appellant; one was that the decree of *Bhadoon*, 24, 1985, was no longer a subsisting decree as it had been superseded by the compromise of 7th *Sawan*, 1989. The other objection was that if the said decree had not been superseded, it had become barred by time and was not capable of execution.

The execution Court overruled both of these objections and directed the execution to proceed. On appeal by the appellant the decision of the execution Court was affirmed by the High Court.

So far as the question of supersession of the decree by the compromise is concerned there is not much difficulty. It is the appellant's case and the Courts below have found it to be correct that the

compromise in no ways contravened the provisions of the Agriculturists' Relief Act and therefore it was not legally valid and effective. But this compromise was not incorporated in any decree of the Court nor was it made a rule of the Court. The decree of *Bhadoon* 24, 1985, therefore, though it was made the subject of a compromise which was not legally enforceable, was not at the same time superseded by any decree or order of the Court and remained subsisting and an invalid compromise arrived at between the parties under a misapprehension of the law or of facts cannot have the legal effect of extinguishing it.

The question of limitation, however, raises a more controvertial matter, it is contended that some of the earlier applications which were made for the execution of the decree did not bear proper court fee which the respondents were under an obligation to pay. It is further contended that some of these applications proceeded upon the assumption that the compromise of 1989, itself was capable of execution and they asked for its execution and not of the decree originally passed in the year 1985, and these applications which were not made on proper court fee and which asked for reliefs which were not open to the decree-holders under the decree of 1985, cannot be considered as applications in accordance with law and they cannot form steps in an execution decree and save limitation.

So far as the question of the court fee is concerned, this was a matter which could have been raised by the appellant at the time when the execution was levied on the deficient court fee. But the appellant did not raise any objection to the execution at that time; he allowed the execution to proceed and in the course of execution made a compromise with the respondents, made certain payments towards part satisfaction of the decree and finally allowed the respondents to deposit the deficiency due for court fee. The appellant cannot now be permitted to contend that the past executions to which he raised no objection at the proper time were invalid and the point not having been raised at the proper time is now *resjudicata* and it is not necessary for the Board to express any opi-

nion upon the question of law whether an application made for execution without payment of proper court fee can or cannot be regarded as an application made in accordance with law so as to be a step in aid of the execution of the decree.

The other question, namely, whether some of the applications for execution made by the decree-holders can be regarded as seeking the execution of the decree of *Bhadoon* 24, 1985, or of the compromise of *Sawan* 1989, raises a question of interpretation of these applications. In considering these applications it must be kept in mind that there existed only one decree of *Bhadoon*, 24, 1985, and the compromise arrived at between the appellant and the respondent never merged in a fresh decree. It is true that in those applications for execution the sum claimed was not the one which was due under decree of 1985, but the sum which was due under the compromise and the respondents proceeded upon the assumption that the decree of 1985 has been modified by the compromise. But the fact remains that the only decree which existed between the parties was the decree of 1985, and the respondents by those applications in fact and in law were seeking execution of a decree and not of a mere compromise which had not merged in a decree. In these applications, the date of the decree and the terms of the decree were not stated and only the amount due to the respondents was stated which was larger than what was due under the decree of 1985, and it approximated to the amount due under the compromise.

The obvious interpretation of these applications is that the respondents were seeking execution of the decree of 1985 as modified by the compromise of 1989; and as the compromise is now held to be invalid they were claiming in execution a larger amount than what they were entitled to. It was open to the appellant to repudiate the compromise and to object to this excessive execution at the time when these executions were levied. It was also open to the appellant to accept the compromise and not to object to the execution and to pay up the amount. But the mere fact that an excessive amount is claimed in execution than what is due to the decree-holders would not make

the applications for execution invalid or not in accordance with law so as not to constitute a step in the aid of execution. The test in such a case should be whether the Court could on such an application issue a process of execution and the Board is of opinion that a process could lawfully be issued on these applications as in fact a process was issued on these.

The Board will, therefore, humbly advise His Highness that this appeal be dismissed with costs.

Board of Judicial Advisors.

1945

July 3.

*Before the Hon'ble Chowdhary Niamat Ullah, President,
the Hon'ble Dr. Prosanto Kumar Sen,*

2002

*and
the Hon'ble Pt. Shiam Krishna Dar.*

Har 20.

MIRZA BAHADUR ALI AND OTHERS.—APPELLANTS.

Versus

CH. SUNDER DAS AND OTHERS—RESPONDENTS.

CIVIL APPEAL NO. 26 OF 1945.

*Custom—Full particulars to be given in pleadings
—Proof—Best proof are judgments establishing custom
or its instances and not oral evidence.*

If a person relies upon a family, tribal or local custom in derogation of general law in support of his case, he must give full particulars of the custom in his pleadings and if judgments and decrees and documents exist in proof of a custom or its instances these are best proof of the custom and the person relying on the custom should produce and exhibit them and oral evidence cannot be a proper substitute of documents.

APPEAL AGAINST THE ORDER OF THE HIGH COURT OF JUDICATURE DATED 24TH MAGHAR 2001.

MIAN AHMAD YAR—For the Appellants.

PT. AMAR NATH KAK—For the Respondents.

The judgment of their Lordship was delivered by :—

Hon'ble Pt. Shiam Krishna Dar.—This is an appeal against the judgment and decree of the High

Court of Judicature of Jammu and Kashmir State, dated Maghar 24, 2001, by which it reversed a judgment and decree dated *Katik* 13, 2000, of the Sub-ordinate Judge of Kotli.

On *Bhadoon*, 4, 1976, Buwa Shajadan widow of Hashmat Ali Khan, executed a sale-deed of 318 *kanals* and 3 *marlas* of land situated in village Phayal, which she had inherited from her husband, in favour of the respondents for Rs. 600. On her death which took place on *Poh*, 7, 1989, the appellants who bear the relation of an uncle and a nephew to each other and who are a nephew and a grand nephew respectively of Hashmat Ali, alleging that they were reversioners of Hashmat Ali and that the sale made by Buwa Shajadan was without any legal necessity, brought a suit for possession of the property sold.

The trial Court holding that the appellants were the reversioners of Hashmat Ali and that his widow Buwa Shajadan by custom was not empowered to transfer the property without legal necessity, and that the sale made by her was without legal necessity, decreed the claim. The High Court, in appeal, without dissenting from the finding of the trial Court about the appellant being the reversioners of Hashmat Ali and without deciding the question whether the sale was made for legal necessity or without it, dismissed the claim on the ground that the custom by which Buwa Shajadan was restricted from transferring the property in her possession without legal necessity was not proved.

Hashmat Ali died in or about Samvat 1961; he was an agriculturist by profession and Chib by caste and professed Mohammadan religion. He left unto him surviving his wife Buwa Shajadan and two daughters named Basant and Makho who married and bore children. The appellants' case in substance shortly stated before the Board is that on the death of Hashmat Ali his widow succeeded to his estate not under Mohammadan Law but under a family custom which also prevails amongst the Chib agriculturists generally of Illaqa Bana whereby a widow succeeds not to a share in her husband's estate in absolute interest as ordained by Mohammadan Law

but to the entire estate left by her husband for life to the exclusion of all other heirs of her husband and on the death of the widow the estate reverts to her husband's male agnatic heirs to the exclusion of daughters and daughter's sons and that the widow, who thus gets a life estate under the custom, can transfer it only for legal necessity. They further allege that the sale which she made in favour of the respondent was without any legal necessity and on her death the appellants, who are nephews and grand-nephews of Hashmat Ali, were his reversionary heirs to the exclusion of his daughters and daughters' sons and were entitled to the possession of the entire estate.

Hashmat Ali, Buwa Shajadan and the appellants being all Mohammadans, succession to Hashmat Ali's estate on his death would primarily be governed by Mohammadan Law, unless there exists any family, tribal or local custom which superseded the Mohammadan Law, and to the extent the custom superseded the Mohammadan Law the succession would be governed by custom. Under Mohammadan Law, the widow of Hashmat Ali along with his daughters and other residuary heirs would, only receive a share in his estate and would not succeed to his entire estate, and he would have absolute power of transfer over the share which she would thus receive and which share on her death would devolve on her personal heirs and not on the heirs of Hashmat Ali. On the other hand if under a custom she succeeded not only to a share but to the entire estate of Hashmat Ali to the exclusion of his daughters and other heirs and in this estate she succeeded to a life interest and not to an absolute interest and on her death the property devolved upon her husband's reversionary heirs and not upon her personal heirs, then her powers of disposal in regard to the estate in law, would be limited to her life-time and she would have no power to dispose of the estate beyond her life-time unless there is a custom enlarging her power, and the extent of this enlargement of power will depend upon the incident of custom. It is not the appellants' case that if the widow succeeded to a share of her husband's estate under Mohammadan Law absolutely, then there exists any custom which restricts her power of

alienation and the appellants also concede that when a widow succeeds under custom she can also under custom alienate the property for legal necessity.

The question, therefore, whether a widow has or has not the power to alienate without legal necessity, does not arise as an independent issue in the case. If instances exist which go to show that a widow succeeded to the estate of her husband to the exclusion of her other heirs or which go to show that the reversionary heirs succeeded in recovering the property transferred by the widow without legal necessity after her death they go to prove that the widow succeeds under the custom to a life estate and not under Mohammadan Law and after her death, under the same custom the reversionary heirs succeed her. These instances are valuable evidence on the question whether the succession is under the Mohammadan Law or under the custom; but apart from that they are not of any real evidentiary value in the controversy which is involved in this case. The issues, therefore, which properly arise in this case are:—(1) Whether there exists a custom in the family of Hashmat Ali or amongst agriculturist Chibs of *Illaga Bana* under which a widow succeeds to life interest in her husband's estate? (2) Whether under the aforesaid family or tribal custom the appellants are the reversionary heirs of Hashmat Ali? (3) Whether the sale dated *Bhadon*, 4, 1976, made by Buwa Shajadan in favour of the respondents was for legal necessity and therefore valid?

The appellants alleged in the plaint that they were the reversionary heirs of Hashmat Ali entitled to his estate which was in possession of his widow Buwa Shajadan who died about six years ago and who made a transfer of the said estate without any legal necessity to the respondents which transfer under law and custom she had no right to make. The issues framed in the trial Court included the following three issues:—

- “(3) Whether under any custom by which the plaintiffs and *Mst.* Shajadan were bound, a widow is not entitled to alienate the property of her husband without necessity?

- (5) Is the property ancestral *qua* the plaintiffs ?
- (6) Are the plaintiff the reversioners of *Mst. Shajadan* ?”

At the trial some evidence was led by the appellants to show that Buwa Shajadan succeeded to the entire estate of Hashmat Ali, that the appellants were his nearest male agnatic relations and that the sales made by some agriculturist Chib widows of *Illaga Bana* were set aside at the instance of reversioners and property sold was restored to them. But in the plaint it was not specifically stated that the succession was governed by custom and not by Mohammadan Law and that Buwa Shajadan and the appellants succeeded under any custom, nor was it expressly stated that Buwa Shajadan succeeded only to a life interest, nor any particulars of the custom were stated. And at the trial though witnesses were called to prove the instances in which alienation made by widows, without any legal necessity, were set aside in suit instituted by reversioners; Copies of judgments and decrees of these suits were not produced and time and particulars of these instances were not given. The trial Judge finding that the alleged relationship between the appellants and Hashmat Ali was proved, assumed as if it were a matter of course and found that the appellants were reversionery heirs of Hashmat Ali and mainly relying upon the fact that some portion of the oral evidence of the appellants had received corroboration from some portion of the respondents' evidence, he held the custom proved which prohibited widows from transferring property without legal necessity. In appeal before the High Court the finding, that the appellants were the reversionery heirs of Hashamat Ali, was apparently not challenged; in any case the High Court has assumed its correctness. It has further assumed that Buwa Shajadan succeeded under Mohammadan Law and on that assumption laid the burden upon the appellants of proving that there was any custom by which the power of alienation of the widow was restricted. And after rightly criticising the laxity and insufficiency of the appellants' pleadings and the quality of evidence in proof of the custom it came to the conclusion that the

custom of restricting the widows' power of alienation was not proved.

The Board agree with the criticism of the High Court in regard to the laxity of pleadings of the appellants and in regard to the quality of the evidence produced by the appellants. It cannot be sufficiently emphasized that if a person relies upon a family, tribal or local custom in derogation of general law in support of his case he must give full particulars of the custom in his pleadings and if judgments and decrees and documents exist in proof of a custom or its instances these are the best proof of the custom and the person relying on the custom should produce and exhibit them; and oral evidence cannot be a proper substitute of documents.

But despite this criticism the fact remains that the real issue which arose in this case has not been tried out by the High Court and the case has been disposed of by both the Courts on an issue which does not properly arise in this case, and there has been no fair and proper trial of the real matters in the controversy between the parties. The appellants definitely alleged in their plaint that they were the reversionery heirs of Hashmat Ali, entitled to his estate on the death of his widow by avoiding the transfer made by the widow which she had no right to make. The trial Court found that they were the reversionery heirs; the High Court has not dissented from that finding. If the appellants are the reversionery heirs of Hashmat Ali then it follows that his widow had only a life estate and it further follows that succession was governed not by Mohammadan Law but by custom. And if the widow had only a life estate it follows that she had no power to alienate, beyond her life-time unless there exists a custom enlarging her power of alienation the burden of proof, which will be not upon the appellants but upon the respondents and of which there is no allegation and no proof so far as the respondent is concerned though the appellants concede that she has a power of alienation in case of necessity.

The case, therefore, must go back for determination of the three issues which arise in the case and

which the Board has stated above and the only question which remains to consider is that whether these issues should be determined upon the evidence already recorded or after giving an opportunity to the parties to produce fresh evidence. In view of the fact that a real mis-conception has prevailed throughout the proceedings as to the real nature of the controversy, the Board is of opinion that the parties should be given opportunity to produce fresh evidence but as the appellants are mainly responsible for this fresh trial on account of laxity of their pleadings and their faulty evidence and as they are to receive the main benefit of the new trial they must pay costs up to this stage of the proceedings.

The Board will, therefore, humbly advise His Highness that this appeal be allowed, that the decrees of the Courts below be set aside and that the case be remanded to the trial Court through the High Court, with the direction that it be restored to its original number and be disposed of according to law after determination of the three issues indicated above. At the fresh trial an opportunity shall be given to the parties to produce fresh evidence. The appellants shall pay to respondents costs up to this stage of proceedings ; future costs will be in the discretion of the Court.

Held, that there is no law which prohibits an agriculturist in the Jammu and Kashmir State from mortgaging his residential house. It follows as a corollary that if the mortgage thereof is valid, it must be enforceable by sale of the mortgaged property, namely, the house.

I. L. R. 46 A. 489 referred to.

APPEAL AGAINST THE ORDER OF THE HIGH COURT OF JUDICATURE DATED MAGHAR 28, 2001.

CH. INDER DASS—For the appellants.

PT. ARJAN NATH BHAN—For the respondent.

The judgment of their Lordships was delivered by :—

Hon'ble Ch. Niamat Ullah.—This is an appeal from an order passed by the High Court in an execution of a decree.

The facts may be briefly stated. The respondent executed a deed of mortgage in 1993 hypothecating his house in favour of the appellant. The latter brought a suit for enforcement of that mortgage and a consent decree was passed. The compromise on which it was based provided that the decretal amount, namely Rs. 6,800, would be paid by certain instalments and in default of payment of three instalments the entire sum would be recovered by sale of the house. No instalment was paid and the decree-holder applied for sale of the house. Thereupon the judgment—debtor (the respondent) objected that he was an 'agriculturist' and that the house in dispute, which is his residential house, is exempt from sale under section 60, Civil Procedure Code. The Senior Subordinate Judge, before whom the application for sale had been made, dismissed the objection, but on appeal the High Court upheld it holding that the provisions of section 60 Proviso, clause (c) of the Civil Procedure Code are mandatory and barred the decree-holder's application for sale of the house. The latter has preferred the present appeal to His Highness.

It was contended by the appellant's learned counsel that section 60 Civil Procedure Code is applicable only to cases of simple money decree and that the decree sought to be executed in the present case is one for sale of mortgaged property in enforcement of a mortgage to which section 60 Civil Procedure Code has no application. There is no discussion in the judgment of the High Court of the question of law thus raised before the Board. On the face of it the judgment of the High Court takes it for granted that section 60 of the Civil Procedure Code is applicable to the circumstances of this case.

Section 60 of the Civil Procedure Code occurs under the heading 'attachment' which is out of question in the case of a mortgage decree. It can not be denied that an 'agriculturist' within the meaning of section 60 is competent to mortgage his house and if he does so there is nothing to prevent a decree for sale being passed in enforcement of the mortgage. To hold that section 60 prohibits a sale in pursuance of a mortgage decree will be tantamount to declaring that the mortgage of his house by an agriculturist is inoperative. Reliance is placed on behalf of the respondent on the language of the Proviso, clause (c), to section 60. It runs as follows :—

“ Provided that the following particulars should not be liable to such attachment or sale, namely :—(c) house and other buildings.....belonging to an agriculturist and occupied by him.”

Emphasis is laid on the word 'or' between "attachment" and "sale" and it is argued that the Proviso prohibits not only attachment but also sale and that there is no justification for limiting it to sale in execution of a simple money decree. A careful examination of the Civil Procedure Code from sections 51 to 64 shows that they are in relation to simple money decrees. The question has been discussed at length in *Mubarik versus Ahmed*, a full Bench ruling of the Allahabad High Court reported in I. L. R. 46 Allahabad, page 489, in which it has been definitely held that a house occupied by an agriculturist is not protected from sale in execution of a decree based on

the mortgage in respect of it, though it may be occupied by an agriculturist, unless he is prohibited by law from mortgaging it or selling it. The Board fully agree with the reasoning on which that conclusion is based. As already pointed out there is no law which prohibits an agriculturist, in this State, from mortgaging his residential house. It follows as a corollary that if the mortgage thereof is valid it must be enforceable by sale of the mortgaged property, namely, the house.

For these reasons the Board humbly advise His Highness to allow this appeal with costs and set aside the order of the High Court and restore that of the Senior Sub-Judge, Jammu.

Board of Judicial Advisers.

*Before the Hon'ble Ch. Niamat Ullah, President,
the Hon'ble Dr. Prosanto Kumar Sen,
and
the Hon'ble Pt. Shiam Krishna Dar.*

1945

July 13.

GHULAM AHMAD MALIK—APPELLANT.

Hav 30th

Versus

2002.

GHULAM RASOOL AND OTHERS--RESPONDENTS.

CIVIL APPEAL NO. 15 OF 1945.

Specific performance—Discretionary with Courts to allow or refuse it.

It is a well established rule that specific performance rests in the sound discretion of the Court allowing or refusing it.

APPEAL AGAINST THE ORDER OF HIGH COURT OF JUDICATURE DATED *Bhadon 21, 2001.*

MR. K. M. MUNSHI—For the Appellant.

RAI BAHADUR BADRI DASS—For the Respondents.

The judgment of their Lordships was delivered by :—

Hon'ble Dr. Prosanto Kumar Sen.—The plaintiff appellant instituted a suit against the defendants—

respondents for specific performance of a contract entered into between him and the defendants 1 to 5, on the 2nd *Phagan*, 1999. He also prayed for damages to the extent of Rs. 5,000 and for an injunction restraining the defendants Nos. 1 to 5 from executing a sale-deed in respect of the property in dispute in favour of the defendants 6 to 9. The property which is the subject-matter of the agreement consists of *Wasidari* land and building on the Bund at Srinagar. The plaintiff's case is that it was agreed upon by the defendants 1 to 5 that they could transfer the property to the plaintiff and for that purpose present an application, for sanction, to the Nazool Officer; and that they also undertook to make the necessary statements before such officer, when called upon by him, in order to obtain his sanction for the transfer contemplated in favour of the plaintiff. Rs. 16,000 was the price of the property agreed upon between the parties, out of which at the time of the execution of the document the defendants 1 to 5 received from the plaintiff Rs. 13,000 in cash and the balance was to be paid to them at the time of execution and registration of the sale-deed. The defendants 1 to 5 undertook to get the sale-deed executed and registered within one week after the sanction to the transfer was obtained from the Nazool Department; and it was agreed that in case of failure the plaintiff would get it compulsorily registered. In accordance with the terms of the agreement, the defendants 1 to 5 made over the possession of the property to the plaintiff. Since then the plaintiff has been in possession of it. On the 6th *Phagan*, 1999, the agreement, above mentioned, was registered. On the 16th of *Maghar*, 2000, an application was made to the Revenue Department by the defendants 1 to 5 for permission to transfer in favour of the plaintiff. It does not appear from the materials on the record why this application for permission to transfer, though written out on the day of the agreement and was handed over to the plaintiff, was not presented till the 16th of *Maghar*, 2000, i.e., 8 or 9 months later. But on that very date there happened some other events which have led to the present litigation. Defendants 1 to 5 executed on that date a deed of sale in favour of defendants 6 to 9 in respect of the property, which was the subject-matter of the agreement with plaintiff, for a

consideration of Rs 20,000. They also presented an application for permission to sell the property to defendants 6 to 9 before the Nazool Department. It was only then that the plaintiff presented the application which had all along been in his possession. With respect to this application for permission, the Nazool Department called upon the defendants 1 to 5 to attend at the office and to make the necessary statements, as provided under the rules. The defendants did not respond. But in respect of the other application they appeared before the Nazool Department and made the necessary statements with the result that the permission to transfer was obtained in favour of defendants 6 to 9. On *Poh*, 2000, the plaintiff filed the suit, out of which this appeal arises, for specific performance, for damages and for other incidental reliefs mentioned above. The defendants resisted the suit on various grounds; among others, that the defendants were not at fault, that they were ready and willing to complete the transaction of sale but that the plaintiff himself was indifferent, took no interest in the matter and made unnecessary delay as a consequence of which they entered into the sale transaction with the defendants 6 to 9 in whose favour the Nazool authorities granted permission for transfer. As regards the plea of specific performance, they pleaded that, inasmuch as the permission of the Nazool Department was a necessary pre-requisite for transfer, no decree for specific performance or damages could be granted.

The case was tried on the original side of the High Court and it was held by Wazir J. that although the permission of the Revenue authorities was necessary before actually affecting the transfer it would not be necessary to make the agreement for sale effective, and the plaintiff would nonetheless be entitled to specific performance of the agreement. He accordingly ordered the defendants Nos. 1 to 5 to take proceedings for obtaining the permission of the Revenue authorities to transfer the property to the plaintiff within three months and within one month of the receipt of the sanction to convey the property to the plaintiff in accordance with the terms of the agreement. On appeal the learned Chief Justice and Masud Hassan J. held that the plaintiff was not

entitled to a decree for specific performance of the agreement ; but that he was entitled to damages to the extent of Rs. 5,000 as provided for in the agreement. Hence this appeal to His Highness by the plaintiff.

Before the Board, learned counsel for the plaintiff-appellant has strenuously urged that it is a fit case for granting a decree for specific performance. On the other hand, learned counsel for the defendants-respondents has vigorously put forward the arguments which were advanced before the Court of appeal and which found favour with it. The controversy has centred round the terms of rules 35 and 40 of Ailan No. 10 dated 7th *Bhadun*, 1976. Rules 35 and 40 run as follows :—

“ Rule 35. No *Wasidar* shall mortgage, sell or in any other way transfer the land leased to him under these rules, or the building erected on such land, except with the permission of His Highness the Maharaja Sahib Bahadur obtained through the Governor. All transactions entered into by the *Wasidar* without such permission shall be void, and no Court shall take cognizance of them. Provided always that the Durbar shall have a preferential right of purchase in the case of all transfers intended to be made under the provision of this clause paying a fair market value thereof.”

“ Rule 40. Any person who builds upon, or occupies, a State land without proper sanction under these rules, or a *Wasidar* encroaches upon a State land which has not been granted to him, shall be liable under the order of the Governor to a fine not exceeding Rs. 100 and to summary ejectment from such land.”

Learned counsel for the defendants-respondents contends that the agreement for sale, in order to become valid and binding, must first of all be perfected by permission received from the Revenue Department and that without such permission it

must be deemed to be ineffective. Consequently, no Court could decree specific performance of such an agreement. The words "all transactions entered into by the Wasidar without such permission shall be void and no Court shall take cognizance of them," it is urged, include an agreement for sale as well. Learned counsel for the plaintiff-appellant, on the other hand, contends that "all transactions" could only mean transactions such as mortgage, sale or transfer in any other way," referred to in the opening words of rule 35. Various authorities have also been cited on both sides for or against the contention that the permission of the Revenue authorities, being an essential pre-requisite to transfer, no specific performance can be granted in the present case.

In the opinion of the Board it is not necessary to deal with these contentions of law raised by both parties based on the effect or interpretation of rules 35 and 40. What weighs with the Board is that no satisfactory material has been placed before them to explain the inordinate delay in getting the application for permission to transfer presented before the Nazool Department. Had he been really vigilant it is difficult to understand how the matter could have drifted for 8 or 9 months until the fateful 16th of *Maghar*, 2000, when serious complications arose. The laches of the plaintiff in this behalf should be sufficient to disentitle the plaintiff to specific performance of the agreement. It is a well-established rule that specific performance rests in the sound discretion of the Court allowing or refusing it. The plaintiff's laches together with the fact that the High Court in the exercise of sound discretion has come to the conclusion that this is not a fit case for specific performance, are sufficient grounds for not interfering with the judgment and decree of the High Court.

The Board would, therefore, humbly advise His Highness to uphold the Judgment and decree of the High Court and to dismiss the appeal with costs.

1945

Board of Judicial Advisers.

July 12.

*Before the Hon'ble Ch. Niamat Ullah, President,
the Hon'ble Dr. Prosanto Kumar Sen,
the Hon'ble Pt. Shiam Krishna Dar.*

2002.

Har 29

FIRM L. GOPI CHAND—APPELLANT.

Versus

AKBAR JOO AND OTHERS—RESPONDENTS.

CIVIL APPEAL NO. 23 OF 1945.

Limitation Act (IX of 1995)—Article 105—Instalment bond with default clause—Period of limitation to commence at the option of the plaintiff, on default of any instalment or when the whole amount falls due.

Article 105 covers the case of a bond which has a clear provision that in case of default in payment of any instalment the whole debt shall become due and the creditor may, at his discretion, treat the whole to be due in case of default in payment of any instalment in which case the instalment character of the bond vanishes and the period of limitation at once begins to run. If on the other hand the creditor chooses to condone the default and to treat the provision of payment by instalment as subsisting he can sue for each instalment as it falls due, the cause of action being in such a case limited to that particular instalment. As to whether in a particular case the creditor has exercised the option of treating the whole to be due or allowed the instalment system of payment to subsist is a question to be determined on the facts of each case.

Articles 104 and 105 correspond to Articles 74 and 75 respectively of the British Indian Act of Limitation which are somewhat differently worded and do not afford perfect analogy and cases under these articles may be misleading.

APPEAL AGAINST THE ORDER OF HIGH COURT
OF JUDICATURE DATED *Baisakh* 30, 2000.

MR. H. N. DAR—For the Appellant.

MIAN AHMAD YAR—For the Respondent.

The judgment of their Lordships was delivered by :—

Hon'ble Chowdhary Niamat Ullah.—This appeal has arisen out of a suit brought by the appellant firm for recovery of Rs. 700 on foot of an instalment bond executed by the respondent and one Ahad Joo, since deceased, on 3rd *Phagan* 1988. The suit was dismissed against the legal representatives of Ahad Joo and the plaintiff has acquiesced in the decree to that extent. The first two Courts (Sub-Judge and the District Judge) partly decreed the suit but on appeal the High Court dismissed it on the ground that it was barred by limitation. In appeal before the Board it has been argued on behalf of the plaintiff that the view of law, on which the decision of the High Court proceeds, is erroneous.

To appreciate the precise nature of the question involved in the appeal it is necessary to set out particulars of the instalments stipulated in the bond and the extent to which they were paid. As already stated the bond was executed on 3rd *Phagan* 1988, for a sum of Rs. 1,000 payable by yearly instalments of Rs. 150 each except the last which was of Rs. 100 only. The bond provided that in case default was made in the payment of any instalment the whole debt would become payable and interest would run at the rate of 1 per cent. per mensem. No instalment was paid in full. Small amounts ranging from Rs. 25 to Rs. 55-2-6 were paid from time to time up to 13th *Maghar* 1994. If the cause of action be deemed to have accrued on the first default in payment of the full instalment, which occurred on 6th *Chet* 1988, the suit which was brought on 11th *Jeth* 1996, that is more than six years from that date, is barred by limitation as admittedly none of the payments saves limitation under section 20 of the Limitation Act. This is the view taken by the High Court and it is conceded that if the whole debt became due in default in payment of the first instalment so as to make time forthwith, the suit was rightly held by the High Court to be barred by limitation.

The learned counsel for the appellant, however, argued that the plaintiff was entitled at all events, to

recover that was due in respect of the instalments falling due within the period of six years immediately preceding the suit. The articles of the Second Schedule to the Limitation Act, which are applicable to suits based on instalment bonds are 104 and 105. The former relates to a suit "on a promissory note or bond payable by instalments." The period of limitation for such a suit is six years commencing on the expiration of the first term of payment as to the part then payable, and for the other parts, the expiration of the respective terms of payment." Article 105 is applicable to a suit "on a promissory note or bond payable by instalments, which provides that if default to be made in payment of one or more instalments, the whole shall be due." The period of limitation for such a suit is six years commencing "at the option of the plaintiff, on the default of any instalments or when the whole amount falls due." These articles correspond to articles 74 and 75 respectively of the British Indian Act of Limitation which are somewhat differently worded and do not afford perfect analogy and cases decided under these articles may be misleading. For cases arising under the State Limitation Act, the language of articles 104 and 105 should be adhered to in deciding the question of limitation. Article 104, which relates to simply instalment-bonds, is not applicable to the present case which is covered by the language of article 105. The bond in suit has a clear provision that in case of default in payment of any instalment the whole debt shall become due and the creditor, may, at his option, treat the whole to be due in case of default in payment of any instalment in which case the instalment character of the bond vanishes and the period of limitation at once begins to run. If on the other hand the creditor chooses to condone the default and to treat the provision of payment by instalment as subsisting he can sue for each instalment as it falls due, the cause of action being in such a case limited to that particular instalment. As to whether in a particular case the creditor has exercised the option of treating the whole to be due or allowed the instalment system of payment to subsist is a question to be determined on the facts of each case.

In the present case the plaintiff firm may well

be deemed to have accepted small sums as token payments towards the yearly instalments as the amount paid by the debtor in any year never exceeded the yearly instalment nor did he demand the entire or interest at any time before the suit. If he had done so his action would have indicated that he treated the whole to be due. It should be noted that liability to pay interest arises only in that event and as long as instalment method of payment continues the debtor was not liable to pay any interest.

Learned counsel for the respondent argued that the plaintiff's claim as disclosed by his allegations in the plaint is not based on the option of allowing the instalment method of payment to continue. The Board have examined the plaint and are of opinion that it does not lend support to this contention. The plaint states the terms of the bond, the dates of instalments of payment without committing the plaintiff to the statement that the whole had become due in default of payment of any particular instalment. In this view it is not correct to say that the plaintiff having once exercised his option to treat the whole debt to have become due on default in payment of an instalment it is not open to him to claim a decree for instalments falling due within the period of six years immediately preceeding the institution of the suit. The Board are of opinion that on the allegations the plaint and the evidence in the case the plaintiff is entitled to claim whatever may be due to him in respect of such instalments as fell due within the period of limitation. The last five instalments totalling Rs. 700 fall due, and Rs. 497-2-6 was paid, within the six years immediately preceeding the suit. After making an allowance for what has been paid by the debtor within that period the sum of Rs. 302-2-6 is due to the plaintiff in respect of such instalments.

In the result the Board humbly advise His Highness to allow the appeal in part, discharge the decree of the High Court and the two lower Courts and to substitute therefor a decree in favour of the appellant against the respondent Akbar Joo for Rs. 302-2-6. Parties to pay their own costs throughout.

Board of Judicial Advisers.

1945 Before the Hon'ble Ch. Niamat Ullah President,
 the Hon'ble Dr. Prosanto Kumar Sen,
 and
 the Hon'ble Pt. Shiam Krishna Dar.

July 13.

2002

Har 30.

ALLAH DITTA AND OTHERS—APPELLANTS.
 Versus
 SH. MOHD. IQBAL AND OTHERS—RESPONDENTS.

CIVIL APPEAL NO. 13. OF 1945.

APPEAL AGAINST THE ORDER OF THE HIGH COURT
 OF JUDICATURE DATED Maghar, 16, 2000.

Registration Act (XXXV of 1977)—Necessary requirements of law complied with for the purpose of valid registration by the vendor-Deed got registered after his death by his agent-Validiy.

A sale deed was prosecuted for registration before the Sub-Registrar by the vendor on the same day it was executed but it could not be registered because the parties were not ready with their State Subject certificates. A receipt of the consideration money was executed by the vendor the same day and also a power of attorney in favour of Piran Ditta and both these documents were got registered by the vendor before the same Sub-Registrar the same day. Soon afterwards vendor died and when necessary certificates were secured by the parties, Piran Ditta presented the sale deed for registration and it was duly registered.

Held that in a case of this description it can safely be said that all the necessary requirements of law were complied with for the purpose of valid registration by the vendor in his life time and therefore deed was validly registered in spite of the fact that the agency of Piran Ditta had ceased on the death of the vendor.

The judgment of their Lordships was delivered by :—

Hon'ble Dr. Prosanto Kumar Sen.—This appeal arises out of a suit for cancellation of a sale-deed,

executed by one Gama, in favour of the defendants-respondents. It appears that on the 29th of *Sawan*, 1987, Gama executed the sale-deed for a consideration of Rs. 250. The plaintiffs claimed to be the reversioners and challenged the transaction of sale on various grounds out of which only one concerns the present appeal, namely, that the deed was not validly registered and did not pass any title. The circumstances under which the validity of registration is challenged are as follows:— After the execution of this deed of sale, and on the very date of its execution, it was presented for registration before the Sub-Registrar but it could not be registered because the parties were not ready with certificates to the effect that they were State Subjects and were agriculturists. Gama could not wait and, therefore, on the same day a receipt of Rs. 200 was executed by him as also a power of attorney in favour of Piran Ditta. As the consideration for the sale deed was Rs. 250, and Rs. 50 had already been taken by Gama, he received the remaining Rs. 200 from the purchaser in the presence of the Sub-Registrar. The receipt was then and there presented for registration and was duly registered by the Sub-Registrar. It appears that Gama thought that he might not be able to present himself before the Sub-Registrar at the time when the registration was to be completed and, therefore, he executed the power of attorney in favour of Piran Ditta and got that registered as well. Soon afterwards Gama died and Piran Ditta, as agent of Gama, presented the document for registration, when the necessary certificates had been secured by the parties. The point that has been taken by the learned counsel for the appellants is that with the death of Gama, Piran Ditta's agency had automatically ceased and, therefore, he had no longer any authority under the power of attorney to present the sale-deed for registration. Now there can be no question that his agency had ceased but in a case of this description it can safely be said that all the necessary requirements of law were complied with for the purpose of valid registration. Gama himself had acknowledged execution of the document before the Sub-Registrar when he personally presented it before him (the Sub-Registrar) on the date of execution; he had further

acknowledged having received the full consideration and had got the receipt registered on that occasion.

The Board are of opinion that the view taken upon these facts by the learned Munsiff and the learned District Judge in holding that the registration was valid is quite correct. The High Court arrived at the same result and up-held the decision of the Courts below, but through a different process of reasoning. The learned Judges held that the registration was not valid but under section 6 of Notification 10 of 1972, the vendee being an agriculturist and holding land as "*Khud Kasht*," was competent to purchase the land without a registered sale-deed.

In the result the Board would humbly advise His Highness, for the further reason that the deed was validly registered, to dismiss the appeal with costs.

Board of Judicial Advisers.

<p>1945</p> <hr/> <p>July 10.</p> <hr/> <p>2002</p> <hr/> <p>Har 27</p>	<p><i>Before the Hon'ble Ch. Niamat Ullah, President,</i> <i>the Hon'ble Dr. Prosanto Kumar Sen,</i> <i>and</i> <i>the Hon'ble Pt. Skiam Krishna Dar,</i></p> <hr/> <p>MST. ALLAH RAKHI—PETITIONER.</p> <p style="text-align: center;"><i>Versus</i></p> <p>CH. ALLAH DITTA AND OTHERS—OPPOSITE-PARTY.</p>
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APPLICATION FOR SPECIAL LEAVE TO APPEAL
No. 14 OF 1945.

Letters patent—Para. 12—Appeals to His Highness Act (XVI of 1996)—Section 2 (a)—Appeal from the decree of a Single Judge of the High Court to His Highness excluded unless the remedy of appeal to a Division Bench is availed of or an unsuccessful attempt to obtain leave for such an appeal is made.

The last sentence of para. 12 of the Letters Patent excludes by necessary implication an appeal to His Highness from the decree of a single Judge of the High Court from which an appeal is provided for to a Division Bench. It is only from "other judgments of the Judges

of the said High Court." that an appeal can lie to His Highness. The intention clearly is that no appeal should lie direct to His Highness unless the remedy of appeal to a Division Bench is availed of or an unsuccessful attempt to obtain leave for such appeal is made. If the single Judge grants leave and an appeal is preferred to a Division Bench a further appeal may lie to His Highness from the decree passed by the Division Bench if it fulfills the requirements of the law. If the Single Judge refuses leave his decree becomes final and the aggrieved party can apply to the High Court for leave to appeal to His Highness and on refusal of such leave he can apply to His Highness for special leave to appeal. To take any other view will involve the anomaly that in cases in which the value of the subject matter of the suit and of appeal to His Highness is Rs. 2,500 or more the aggrieved party has a choice of forum. He may, if leave is granted, appeal to a Division Bench or if he so chooses, he may directly appeal to His Highness. Indeed in the case where the requirements of valuation are fulfilled he will have an absolute right of appeal to His Highness whereas his right of appeal to a Division Bench is conditioned on being granted by the Single Judge deciding the appeal.

MR. DEWAN CHAND SHARMA—For the Petitioner.
CH. INDER DASS—For the Opposite-Party.

The judgment of their Lordships was delivered by :—

Hon'ble Chowdhary Niamat Ullah.—This petition for special leave to appeal raises an important question as to the effect of paragraph 12 of the Letters Patent read with section 2 (a) of the "Appeals to His Highness' Act." The petitioner brought a suit for redemption on payment of Rs. 250 on foot of a mortgage which related to property of which the value is admittedly more than Rs. 2,500. The trial Court dismissed the plaintiff's suit. On appeal the District Judge set aside the decree of the trial Court and remanded the suit. On the defendant's appeal to the High Court the decree of the trial Judge was restored. The second appeal to the High Court was heard by a Single Judge. Under paragraph 12 of the "Letters

Patent" an appeal could have lain to a Division Bench, if leave had been granted therefor, by the single Judge who disposed of the second appeal. The plaintiff did not avail himself of that remedy and applied to the High Court for leave to appeal directly to His Highness on the ground that the value of the subject matter of the suit which, according to him, was the value of the property mortgaged, was more than Rs. 2,500 and that the appeal to His Highness likewise involved a question respecting property of like value. The contention was that the High Court having reversed the decree of the first court of appeal an appeal to His Highness was of right under section 2 (a) of the "Appeals to His Highness' Act." The High Court refused leave without going into the question of the value of the subject matter of the suit and of the proposed appeal to His Highness on the short ground that the case did not fulfil the requirements of an appeal to His Highness. As pointed out by the Board in a recent case the High Court ought to have determined the question of valuation if otherwise an appeal to His Highness was competent. The Board can dispose of the present petition on the assumption that the value of the subject matter of the original suit and of the proposed appeal to His Highness is more than Rs. 2,500. But for a provision in paragraph 12 of the "Letters Patent," to be presently mentioned, it would have been arguable that the requirements of section 2 (a) of the "Appeals to His Highness' Act" are fulfilled and that an appeal lies to His Highness even though the petitioner did not avail herself of her remedy of a Letter Patent appeal to a Division Bench.

But having carefully considered the language of paragraph 12 of the "Letters Patent", the Board are of opinion that an appeal to His Highness, in the circumstances of the present case, is barred. That paragraph provides, *inter alia*, that "an appeal shall lie to the said High Court of Judicature from the judgment (not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court, and not being an order made in the exercise of revisional jurisdiction, and not being a

sentence or order passed or made in the exercise of the power of superintendence) of one Judge of the said High Court or one Judge of any Division Court and that notwithstanding anything hereinbefore provided an appeal shall lie to the said High Court from a judgment of one Judge of the said High Court or one Judge of any Division Court, consistently with the provisions of the Civil Procedure Code, made in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court where the judge who passed the judgment declares that the case is a fit one for appeal ; but that the right of appeal from other judgments of the Judges of the said High Court or of such Division Court shall be to Us, Our Heirs or Successors and be heard by Our Board of Judicial Advisers for report to Us." The last sentence in the extract, quoted above, excludes by necessary implication an appeal to His Highness from the decree of a Single Judge from which an appeal is provided for to a Division Bench. It is only from "other judgments of the Judges of the said High Court" that an appeal can lie to His Highness. The intention clearly is that no appeal should lie direct to His Highness unless the remedy of appeal to a Division Bench is availed of or an unsuccessful attempt to obtain leave for such appeal is made. If the Single Judge grants leave and an appeal is preferred to a Division Bench a further appeal may lie to His Highness from the decree passed by the Division Bench if it fulfills the requirements of the law. If the Single Judge refuses leave his decree becomes final and the aggrieved party can apply to the High Court for leave to appeal to His Highness and on refusal of such leave he can apply to His Highness for special leave to appeal. To take any other view will involve the anomaly that in cases in which the value of the subject matter of the suit and of appeal to His Highness is Rs. 2,500 or more the aggrieved party has a choice of forum. He may, if leave is granted, appeal to a Division Bench or if he so chooses, he may directly appeal to His Highness. Indeed in the case where the requirements of valuation are fulfilled he will have an absolute right of appeal to His Highness whereas his right of appeal to a Division Bench is conditioned on being granted by the single

Judge deciding the appeal. For these reasons the Board are of opinion that the petition praying for leave to appeal from the decree of the Single Judge deciding the second appeal is not maintainable. The petitioner's remedy was to have applied to the Single Judge for leave to appeal in the first instance to a Division Bench. He cannot prefer an appeal to His Highness straight off from the decree passed by the Single Judge in second appeal. Accordingly, the Board humbly advise His Highness to reject this petition with costs.

Board of Judicial Advisers.

1945 *Before the Hon'ble Ch. Niamat Ullah, President,*
the Honble' Mr. Prosanto Kumar Sen,
and
the Hon'ble Pt. Shiam Krishna Dar.

2002

Har 20

GWASHA RAM KAPU—APPELLANT.

Versus

DEWAN JEWAN NATH AND OTHERS—RESPONDENTS.

CIVIL APPEAL NO. II OF 1945.

APPEAL AGAINST THE ORDER OF THE HIGH COURT OF JUDICATURE DATED 7TH BHADON 2001.

Evidence Act (XIII of 1977)—Section 115—Estoppel, what amounts to.

Before a party is estopped from claiming a right, it should be established that by some act or representation such party intentionally led the party pleading estoppel to believe that the right in question would not be exercised. The conduct from which such inference is to be made should be unequivocal.

PT. JIA LAL KILAM—For the Appellant.

PT. AMAR NATH KAK—For the Respondent.

The judgment of their Lordships was delivered by:—

Honble Chowdhary Niamat Ullah.—This appeal has arisen from a suit brought by the plaintiff for

specific performance of a contract to sell and in the alternative for enforcement of his statutory right of prior purchase. The appellant before the Board is the vendee under a sale-deed dated the 3rd *Chet*, 1999. He is arrayed as defendant No. 7 in the suit. The first six defendants are the vendors. The latter had originally agreed to sell the property in question to the plaintiff under three agreements dated 9th *Poh*, 1997. Apparently the intention was to execute three separate sale-deeds; one by four of them, the second by the 5th and the third by the 6th. The aggregate price agreed upon was Rs. 3,800 in all. In the circumstances to be presently mentioned, no sale in pursuance of those agreements was made, on the contrary the vendors executed a sale-deed in favour of defendant No. 7 on 3rd *Chet*, 1997. The consideration entered in the sale-deed is Rs. 6,000.

On the 25th *Bhadoon*, 1998, the plaintiff brought the suit which has given rise to the present appeal, claiming specific performance of the three agreements, already referred to and in the alternative for enforcement of his right of prior purchase. He alleged that the consideration of Rs. 6,000, mentioned in the sale-deed in favour of defendant No. 7, was fictitious and that he was entitled to pre-empt on payment of Rs. 3,800 only. The trial Court (City Judge Srinagar) dismissed the suit so far as the relief of specific performance was concerned and upholding the plaintiff's right of prior purchase decreed his claim to purchase the property on payment of Rs. 3,800. As the result of his finding that the consideration of Rs. 6,000 entered in the sale-deed in favour of defendant No. 7, was fictitious, both parties appealed to the High Court. The case came up for hearing before a Division Bench consisting of Wazir and Masud Hassan JJ. Both the learned Judges were of opinion that the plaintiff's claim to specific performance of the contract had been rightly dismissed by the trial Court. The plaintiff acquiesced in that part of the decree and no further notice need be taken on that part of the case.

The principal question in the trial Court and the High Court was whether the plaintiff had waived his right of prior purchase. The plaintiff's right of prior purchase under the Prior Purchase Act was not

denied by the defenants who, however pleaded that the plaintiff was precluded from exercising it by his conduct after the agreement of sale entered into between him and the first six defendants. This plea, which is termed as one of "waiver" in the proceedings, is based on the correspondence which ensued after the execution of the agreements of sale dated 9th *Poh*, 1997, (23rd of December, 1940). In two of the agreements it was provided that the executants thereof would execute a sale-deed within two weeks while in the third a period of one year was mentioned. Simultaneously with the execution of the agreements the plaintiff handed over to the prospective vendors three cheques as earnest money. The cheques were post-dated and made payable on the 20th January, 1941, *i.e.*, nearly a month after the dates of agreement. The plaintiff took care to instruct his bank not to honour his cheques even on the 20th of January 1941. His explanation in the present case is that he was a gazetted officer in the service of the State and could not purchase the property without obtaining the permission of higher authorities for which he had made an application and it is clear that the plaintiff was not certain as to whether such permission would be forthcoming, if at all, before the 20th of January, 1941. In the meantime the defendants, who had been kept unaware of the disability under which the plaintiff was labouring, called upon him to have the sale-deed executed. They sent a notice to the plaintiff complaining of his conduct in surreptitiously post-dating the cheques and countermanding payment by the bank. The first notice is dated 23rd *Poh*, 1997 (6th January, 1941). The plaintiff replied by a letter dated 27th *Poh*, 1997 (10th January, 1941) wherein he mentioned that he had applied for the requisite permission to purchase. He also alleged that the understanding between the parties was that the execution of the sale-deed would be delayed till permission was obtained. The plaintiff raised, apparently, for the first time a vague question as regards the title of some of the proposed vendors, which according to him required a certain amount of elucidation. The defendants sent a second notice on 4th *Magh*, 1997 (16th January, 1941) repudiating the plaintiff's allegation in his reply to the first notice. They insisted on the plaintiff taking

the sale-deed within 24 hours, otherwise, the defendants reserved to themselves the liberty to transfer the property to some-body else. The plaintiff replied to this second notice by a letter dated 6th *Mach*, 1997 (18th January 1941), in which he said that permission to purchase had not been obtained and that his application therefor was pending. He went on to say that a reminder had been sent and that the execution of the sale-deed should await the receipt of the permission. In this letter also the plaintiff made a mention of the question of title of some of the vendors as to which the plaintiff desired to be satisfied. No further correspondence took place and the defendants 1 to 6 executed a sale-deed in favour of defendant No. 7 on 3rd *Chet*, 1997, *i.e.*, nearly two months after the last letter of the plaintiff. The plea of waiver is substantially based on the allegation that the plaintiff was not in a position to purchase and had no intention of doing so. It is said that these facts estopped him from subsequently exercising his right of prior purchase.

The plea was up-held by the trial Court. In appeal Wazir J. held that there was nothing in the conduct of the plaintiff which amounted to waiver of his right of prior purchase. Masud Hassan J. took a contrary view and held that the plaintiff had, by his conduct, waived his right of prior purchase and was estopped from enforcing it by suit. The learned Judges differed also on the question whether the sum of Rs. 6,000 entered as the price in the sale-deed, was fictitious. Wazir J. held concurring with the trial Court that it was and that the real consideration was Rs. 3,800. Masud Hassan J. held, relying on the evidence produced by the plaintiff, that Rs. 6,000 was the price actually settled and paid. In view, however, of his finding on the question of waiver he was for the dismissal of the suit. On reference being made to Ganga Nath C. J. he negatived the plea of waiver, agreeing with Wazir J. But found, agreeing with Masud Hassan J., that the price actually settled and paid was Rs. 6,000. Accordingly the plaintiff's suit for prior purchase was decreed on payment of Rs. 6,000. Certificate of leave to appeal to His Highness was granted by the High Court and in pursuance thereof the present appeal has been

preferred by defendant No. 7, the vendee. The plaintiff has acquiesced in the decree of the High Court. Hence no question as regards the fictitious nature or otherwise of the price, Rs. 6,000, entered in the sale-deed arises and the sole question which has been argued before the Board is whether the plaintiff-respondent was estopped by his conduct from enforcing his right of prior purchase. In *Barkat Ram Pritam Das versus Sita Ram Baldev Ram* appeal No. 15 of 1944, deciding on 8th July, 1944, (not yet reported) the Board have explained the nature and scope of the plea of waiver in relation to a plaintiff's right of prior purchase. The following passages occurring in the judgment of the Board fully explain the law on the subject :—

“ It will be observed that under sections 14 and 15, which respectively deal with the sale of immovable property in rural and urban areas, the right of prior purchase “ vests ” in certain persons therein described. Section 20 provides that a person entitled to such a right may bring a suit to enforce it when the sale or fore-closure has been effected. In order that a plea of waiver may prevail it should be established that the right of prior purchase, if already vested was extinguished by some act of the person to whom it belonged, or, before it actually arose on the execution of the sale-deed, he precluded himself from enforcing it. It is obvious that in the one case his act should amount to a relinquishment of the right and in the other to a **representation, express or implied**, that he would not claim it. Where the right of prior purchase comes into existence mere inaction, amounting even to acquiescence in the sale to a stranger cannot amount to its relinquishment. The period of limitation within which the right can be enforced is one year and it is open to claimant to enforce his right of prior purchase at any time within limitation. The law has cast no duty upon him to make a **verbal assertion of his right**, or to warn

the intending purchase against his own possible claim, unlike the doctrine of the Mohammadan Law of pre-emption as regards the two well-known "*Talabs*" (demands). At the same time an express declaration by the claimant, on being apprised of the terms of the sale transaction, that he would not purchase the property in respect of which he has the right of prior purchase undoubtedly amounts to relinquishment of his right. Any..... unequivocal conduct which gives rise to the unmistakable inference that the right has been relinquished or that he would not claim it if the sale is effected in favour of a third person will have the same effect."

Applying the test thus laid down by the Board there was nothing in the conduct of the plaintiff after the right of prior purchase vested in him on the execution of the sale-deed in favour of the defendant No. 7 which can amount to relinquishment of such vested right. Indeed there is no suggestion to this effect. The contention is that the plaintiff's conduct before the sale-deed amounted to waiver which estopped him from enforcing his right. In plain language the plea is one of estoppel. Section 115 of the State Evidence Act, like the corresponding section of the Indian Evidence Act, enacts the rule of estoppel. Before a party is estopped from claiming a right it should be established that by some act or representation such party intentionally led the party pleading estoppel to believe that the right in question would not be exercised. The conduct from which such inference is to be made should be unequivocal as pointed out by the Board in the case above referred to. In the present case the plaintiff, far from representing, to the defendants, by express declaration or unequivocal act, that he would not purchase the property, he showed his anxiety throughout to purchase it in accordance with the agreement previously entered into. If it was a fact, as is alleged by the defendants, that the plaintiff was not then in a position to purchase either because he had no money or being a gazetted officer he could not purchase without the permission

for which he had applied to the authorities, all that can be said is that he was playing for time and had recourse to delaying tactics. He was due to retire not long afterwards and had in fact retired when he instituted the present suit and when he did not stand in need of any permission from the State. On the defendant's own allegation, therefore, the plaintiff's conduct led them to believe that he was waiting for time when he would be in a position to purchase and was putting off the matter on false excuses. Such conduct may disentitle him to the relief of specific performance of the agreements to sell but cannot by any stretch of the language of section 115 Evidence Act create an estoppel. The defendant's obvious course was to issue a notice under section 18 of the Right of Prior Purchase Act through the Court and if they had done so the delaying tactics of the plaintiff would have been defeated as in that case, the plaintiff would have been bound to exercise his option within three months and on his failure to do so his right of prior purchase would have been extinguished.

Masud Hassan J. has relied on *Rameshar Prasad Lal Versus Ghisiawan Prashad* and others, A.I.R. 1929 Allahabad, 531. It was observed by Sulaiman and Kendal, JJ. that "There can be an estoppel under section 115, Evidence Act, if the *refusal* of the plaintiff has prejudiced the pre-emptor or the vendee and has induced them to act upon such representation and to compromise their position. We do not see why there should not be a personal estoppel against the plaintiff on account of his own previous conduct. No exception can be taken to this statement of the law but it must be found that there was a "refusal" on the part of the plaintiff to purchase the property and the learned Judges based their decision on the finding that "in the present case we are satisfied that the statement made by the plaintiff Rameshar Prasad to Mr. Stern under the special circumstances of this case and having regard to what had happened previously, amounted to an *absolute refusal* on his part to take the property on the ground that it was impossible for him to raise the money. This flat refusal induced Mr. Stern to enter into negotiations with the vendees, who acting upon such representation believed that Ramehshar Prasad had waived his right

of pre-emption and that there was no longer any fear of such suit. " In the case before the Board the plaintiff never refused to purchase the property. He always insisted on his right to purchase. It may be, as already stated, that he was anxious to delay the matter; if the defendants took it upon themselves to infer that he would not purchase, they did so at their own risk. The plaintiff never represented by word or act that if the property were sold to some other person he would not claim his right of prior purchase. It is clear to the Board that on the facts disclosed by the correspondence no case of estoppel has been made out.

Accordingly the Board humbly advise His Highness to dismiss this appeal with costs.

Board of Judicial Advisers.

*Before the Hon'ble Ch. Niamat Ullah, President,
the Hon'ble Dr. Prosanto Kumar Sen,
and
the Hon'ble Pt. Shiam Krishna Dar.*

1945

July 13.

2002

S. SURJAN SINGH—APPELLANT.

Har 30

Versus

STATE—RESPONDENT.

CRIMINAL APPEAL NO. 2 OF 1945.

APPEAL AGAINST THE ORDER OF THE HIGH COURT OF JUDICATURE DATED MAGH 21, 2001.

Contempt of Court—Article in a newspaper—No reference to any particular judicial case in the article—General attack upon an officer combining in himself both judicial and executive functions—No contempt—Test in such cases.

In an article there was a general attack upon a Wazir Wazarat who in his person combines both judicial and executive functions and the criticism in the article did not specifically relate to the conduct of the Wazir Wazarat judicially as a Court of justice. Even if it be implied that the attack was against the conduct of the Wazir Wazarat as a Court of justice, it clearly had no reference to any particular case.

Held, that the writer of the article was not guilty of the contempt of Court the test applied in such cases is whether the words complained of were in the circumstances calculated to obstruct or interfere with the course of justice and the due administration of law.

If a judge is defamed in such a way as not to affect the administration of justice, he has the ordinary remedies for defamation if he should feel impelled to use them.

A. I. R. 1943 P. C. 202 relied upon.

CH. HAMID ULLAH KHAN ADVOCATE—For the Appellant.

ASSISTANT ADVOCATE GENERAL—For the State.

The judgment of their Lordships was delivered by:—

Hon'ble Pt. Shiam Krishna Dar.—This is an appeal against the judgment of the High Court of Judicature of Jammu and Kashmir dated *Magh 21, 2001*, in a proceeding under section 69 of the Constitution Act 1996, read with clause 23 of the Letters Patent, by which the appellant was convicted for an offence of the contempt of Court and was sentenced to simple imprisonment for three months and to a fine of rupees three hundred and further ordered to pay the fee of the Crown Counsel which was assessed at rupees fifty.

The appellant is the editor of a Newspaper called '*Khuddar*' which is weekly, printed and published from Jammu and this newspaper is also an "Official organ of the Jammu and Kashmir Motor Union, representing a body of transport operators." In the issue of *Katik 15, 2001* which corresponds to October 30, 1944 A. D. appeared an article headed as "The Court Sub-Inspector of Udhampur" in which the general behaviour of the said Court Sub-Inspector was severely criticised and in this article certain observations were also made reflecting upon the behaviour of the Wazir Wazarat of Udhampur.

pur. On a complaint made by the Wazir Wazarat to the High Court, proceedings were taken for contempt against the appellant and the High Court finding that the appellant was guilty of scandalising the Wazir Wazarat, sentenced him to simple imprisonment for three months and a fine of rupees three hundred and further ordered him to pay the Crown Counsel's fee which was assessed at rupees fifty.

The article in question deals with three separate matters ; the Police case against Ranjit Singh motor driver ; the conduct of the Court Sub-Inspector of Udhampur in relation to this case and the behaviour of the Court Sub-Inspector generally and the relations of the Court Sub-Inspector with the Wazir Wazarat. It states that the Police had filed a complaint against Ranjit Singh driver which was to be heard before the Wazir Wazarat at Banihal and latter one was to be heard before the Subordinate Judge at Udhampur but Mr. Vishwamitter, the Court Sub-Inspector of Udhampur without any right tore off from the 'chit' the direction that the case was to be heard by the Subordinate Judge of Udhampur and substituted in its place the direction that the case would be heard by the Wazir Wazarat of Udhampur and a complaint of this improper conduct of the Court Sub-Inspector was made by the driver to the Subordinate Judge who was making enquiry in that matter. The article then proceeds as follows :—

“ Now this news has also come that the Court Sub-Inspetor is on very intimate terms with the Wazir Wa zarat and both go out on tour together. They are very thick together. On account of this it appears extremely difficult for poor to expect justice and this is a matter which has become the subject of public gossip.”

The article further proceeds to invite “ the higher authorities of the Police Department ” to investigate the conduct of Mr. Vishwamitter in general and in relation to the above case and to give him proper punishment and in conclusion it also draws the attention of the Hon'ble the Chief Justice in regard to the conduct of the Wazir Wazarat in the following

passage :—

“ The said Mr. Vishwamitter with the co-operation of Wazir Sahib is doing everything after his heart's desire and thereby is the cause of creating in the public a disaffection against the Government. We also appeal to the Hon'ble Chief Justice that he should after due enquiry bring about a desired change in the behaviour of the Wazir Wazarat and thereby earn the blessing of that part of the public which has no voice and is being oppressed under his hardships, so that the poor may be able by his efforts to breathe comfortably and live comfortably.”

Undoubtedly, the article uses strong language and this language is libelous, both of the Court Sub-Inspector and of the Wazir Wazarat, but the appellant has not been tried and found guilty for publishing a libel. The charge against him is this that he has committed contempt of a Court subordinate to the High Court and the short question for the consideration of the Board is whether this charge has been made out or not.

Now Wazir Wazarat is an official who in his person combines both judicial and executive functions and he comes in contact with the public in both these capacities and his relations with the Court Sub-Inspector might affect the public both in administrative matters as also in judicial matters. The article in question contains a general attack upon the Wazir Wazarat and the criticism in the article does not specifically relate to the conduct of the Wazir Wazarat judicially or as a Court of Justice. Even if it be implied that the attack is against the conduct of the Wazir Wazarat as a Court of Justice, it clearly has no reference to any particular case. The question therefore arises whether a general attack of this nature on the Wazir Wazarat can constitute a contempt of Court.

The law on this subject has been recently stated by Lord Atkin in *Devi Pershad Sharma versus Emperor*,

A. I. R. 1943 P. C 202 to which apparently the attention of the High Court was not invited. The test which is applicable in such cases was thus stated by Lord Atkin :—"In 1893 A. C. 138—the test applied by the very strong Board which heard the reference was whether the words complained of were in the circumstances calculated to obstruct or interfere with the course of justice and the due administration of the Law."

And again:—

If a judge is defamed in such a way as not to affect the administration of justice, he has the ordinary remedies for defamation if he should feel impelled to use them."

If the comments in the present case are examined, it is found that they have no reference to any pending case and it is doubtful whether they have any clear reference to the judicial work of the Wazir Wazarat and they contain only a general charge of improper relations with the Court Sub-Inspector. It is not possible to hold that the comments of this nature "are calculated to obstruct or interfere with the course of justice and the due administration of the law.,, In the opinion of the Board the proceedings in contempt were misconceived and the appellant was not guilty of the contempt of Court.

The Board will, therefore, humbly advise His Highness that this appeal be allowed and that the sentence and order passed against the appellant be set aside and he be acquitted of the offence charged and the fine and costs if realized should be refunded.

Revisional Civil.

Before the Chief Justice (R. B. Ganga Nath).

TOTA KOUL—(DECREE-HOLDER)—APPLICANT
Versus

2002 AHMED WANI AND OTHERS—(JUDGMENT-DEBTORS)
—OPPOSITE PARTY.

Jeth 3.

CIVIL REVISION NO. 152 OF 2001.

*Limitation Act (IX of 1995)—Article 182(5)—
Application for execution of decree not verified as
required by Order XXI rule 11 Civil Procedure Code—
Material irregularity—Application not step-in-aid of
execution.*

*The provision as regards verification of the execu-
tion application is mandatory and the omission to comply
with it constitutes a material irregularity which unless
cured would render the application open to the objection
that the same was not in accordance with law.*

A. I. R. 1936 All. 17, referred to and relied upon.

REVISION FROM THE ORDER OF SENIOR SUB-
JUDGE SRINAGAR (PT. MUNNA LAL SHARMA) DATED
14TH BHADOON 2001.

MR. S. N. DAR ADVOCATE—For the applicant.
MR. JALAL DIN—For the non-applicants.

This is an application in revision by decree holder against the order of the lower Court confirming the order of the execution Court dismissing his application as time barred. Four execution applications

were made. The first was made on 24th *Har* 1993, the second on 13th *Baisakh* 1997, the third on 18th *Jeth* 1998 and the fourth *i. e.* the present on 19th *Jeth* 2000. It has been contended on behalf of the judgment-debtor opposite party that the first two applications were not in accordance with law. There is no doubt that article 182 clause (5) applies to the case. If the first two applications were not in accordance with law, the subsequent applications would not save limitation because they would be apparently time barred. It is not denied that the first two applications were not verified as required by Order 21 rule 11. The provision as regards verification of the execution application is mandatory and the omission to comply with it constitutes a material irregularity which unless cured would render the application open to the objection that the same was not in accordance with law. There is no question of curing the irregularity because the applications were made and consigned to the record room long ago. I fully agree with the view taken in *Raja Ram Gopal Singh versus Harish Chandra Lal and another*, 1936 Allahabad 17. There it was held :—

“ Minor defects in an application for execution, for instance the omission to mention the number of the suit or the date of the decree, etc., do not by themselves render the application for execution defective and not in accordance with law but the provisions of Order 21 rule 11 as regards the signing and verification of the application for execution are mandatory and the omission to comply with the same constitutes a material irregularity which, unless cured, renders the application open to the objection that the same is not in accordance with law.”

The first two applications were not in accordance with law and would not be treated as step-in-aid of the execution. I agree with the orders of the lower Courts. There is no force in the application. It is dismissed with costs.

Appellate Civil.

Before the Chief Justice (R. B. Ganga Nath)
and
Mr. Justice Masud Hasan.

KAKA RAM —(DEFENDANT)—APPELLANT,

Versus

Mst. FAZAL BI—(PLAINTIFF)—RESPONDENTS.
BELI RAM AND ANOTHER —(DEFENDANTS),

CIVIL APPEAL NO. 18 OF 2002.

Civil Procedure Code (Act X of 1997)—Order XXIII, rule 1—withdrawal of suit by permission of Court—Second suit not barred if that suit is based upon a totally different cause of action.

Order XXIII, rule 1 lays down that it is open to a plaintiff to withdraw a suit against a defendant and that permission may be granted to him, if the suit fails by reason of some formal defect or there are other sufficient grounds to institute a fresh suit for the subject matter of the suit. When the second suit is based upon a totally different cause of action, Order XXIII, rule 1 does not apply and no permission to bring that suit is required.

APPEAL FROM THE DECISION OF THE DISTRICT JUDGE, POONCH, (MR. A. H. DURRANI) DATED 25TH PHAGAN, 2001.

MR. A. N. KAK—For the Appellant.
MESSRS, AHMED YAR AND SATYAPAL—For the Respondents.

Per Masud Hasan J.—This appeal arises out of a suit for possession. The property in dispute

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belonged to the plaintiff's father, Fazal Din. On his death it devolved upon his son Fateh Alam. When Fateh Alam died the property was mutated in the name of his widow *Mst.* Kesran. *Mst.* Kesran re-married about 5 or 6 years ago and the plaintiff's case was that she is the sole heir to this property. The defendant is in possession of the property under a sale deed from the Administration of Poonch.

It appears that on the re-marriage of *Mst.* Kesran the Administration of Poonch took possession of the property considering it to be escheat to Government for default of heirs. At that time the present plaintiff brought a suit against the Administration of Poonch and contended that the order of escheat was not justified and that she was entitled as heir to the property. In the course of that suit an application was made by the plaintiff that the present defendant, Kaka Ram, may be impleaded because he was in possession of the property on behalf of the Administration of Poonch. After notice was issued against him and before he put in appearance the plaintiff put in an application praying that his name may be struck of the record. Thereafter a decree was passed in favour of the plaintiff against the Administration of Poonch. It may be stated here that at the time the previous suit was instituted, *i.e.*, in the year 1997 the defendant had not obtained any sale deed from the Administration of Poonch on the basis of which he now claims to be legally in possession of the property. The defendant's main plea was that the suit was not maintainable because of the previous suit which, he says, was withdrawn against him by the plaintiff. Both the courts below repelled this plea and hence the defendant's appeal.

On behalf of the defendant appellant reliance is placed upon the provisions of Order 23, rule 1, Civil Procedure Code, which lays down that it is open to a plaintiff to withdraw a suit against a defendant and that permission may be given to him, if the suit fails by reason of some formal defect or there are other sufficient grounds, to institute a fresh suit for the subject-matter of the suit. It is argued

that no permission was given to bring a fresh suit, and, therefore, the present suit did not lie. Reliance in this behalf is placed upon a Privy Council ruling contained in *Mahanth Singh v. U Ba Yi*, A. I. R. 1939 Privy Council 110. In that case the plaintiff had prayed for the substitution of some trustees as defendants in place of those originally impleaded after the latter had been removed as trustees under the impression that the liability of the trustees as such was not personal. The trial Court, however, was of the opinion that it was the outgoing trustees who were personally liable. After their release a decree was passed against their surety. In the latter's appeal it was held that when the original debtors were given a release, the surety could not be proceeded against. This ruling would not apply to the present case. It would be noticed that the previous suit was, in the first instance brought against the Administration of Poonch only and the defendant's name was sought to be impleaded only because he happened to be in possession on behalf of the Administration. That decree, therefore, could not be binding upon him except in so far as the claim of the Administration of Poonch over the subject-matter of the suit and his possession on their behalf was concerned. The present suit is based upon a totally different cause of action, *i.e.*, a sale deed in favour of the defendant from the Administration of Poonch. This sale had not taken place at the time when the first suit was instituted and it would, therefore, appear that the transfer by the Administration of Poonch in favour of the defendant was without any title. The Courts below have held the defendant to be trespasser. In the circumstances it is difficult to conceive if he can be invested with any other status except that of a trespasser because the Administration of Poonch was not entitled to transfer the property to him. In our opinion the two suits are entirely different and the present suit would not attract the provisions either of Order 23 or Order 2, Civil Procedure Code. We agree with the judgment of the lower Court. There is no force in this appeal and it shall stand dismissed with costs.

Appellate Civil.

Before Mr. Justice Masud Hasan.

ASAD MEER—(DEFENDANT)—APPELLANT.

Versus

KHALIQ SHEIKH—(PLAINTIFF)—RESPONDENT.

CIVIL 2ND APPEAL NO. 303 OF 2001.

*Transfer of Property Act (XLII of 1997)— 2002
Section III—Lease of immovable property—Determina-
tion by forfeiture if lessee claims title in himself— Jeth 31
Plea in written statement no ground for forfeiture.*

The disclaimer of landlord's title relied on as a ground for ejecting a tenant must of necessity be made before the institution of the suit for ejectment. Such a disclaimer contained in the written statement cannot furnish a ground for a decree for ejectment.

APPEAL FROM THE DECISION OF THE SENIOR SUBORDINATE JUDGE SRINAGAR, (PT. MUNNA LAL SHARMA) DATED 6TH KATIK 2001.

MR. HIRDEY NATH DAR—For the Appellant.

MR. ARJAN NATH BHAN—For the Respondent.

This is the defendant's second appeal arising out of a suit for possession of certain immovable property described to be a house situated in the town of Sopore. The plaintiff's case was that the defendant was his lessee under a lease deed dated 1st *Katik* 1994, that the lease was for six years at the rate of Rs. 1-8-0 per year and that the defendant had paid only Rs. 9 in advance but had not paid Rs. 50 as rent and hence he is liable to vacate the premises.

In defence the relationship of landlord and tenant between the parties was denied and it was pleaded that the defendant was the proprietor of the house. It was further pleaded that the document of lease was forged.

On the pleas raised by the defendant the findings of both the Courts below are against him. In other words it has been held that the relationship of landlord and tenant existed between the parties, that the defendant is not the owner of the property and that the lease is a genuine document. In this state of the findings it is not necessary to revert to that portion of the defendant's case which relates to his proprietorship. The finding that the relationship of landlord and tenant exists between the parties must be accepted. But this will not dispose of the case between the parties. On a perusal of the lease deed held to be genuine by the Courts below it would appear that the money under the lease was paid for six years in advance and that the stipulation thereafter was that the rent would be paid yearly and that in the event of the rent not being paid the lessor will be entitled to eject the lessee. The lease deed is dated 1st *Katik* 1994 and the suit has been brought on 4th *Katik* 2000, *i. e.*, 4 days after the lapse of six years. There is, therefore, no question of the plea taken by plaintiff that rent has not been paid. Nor is this the reason given in the plaint as the cause of action for this suit. In these circumstances the stipulations agreed to between the parties should be maintained, *i. e.*, that the plaintiff will not be entitled to eject the defendant as long as rent is paid according to the terms of the lease. This position is assailed on behalf of the plaintiff respondent by the contention that there was also stipulated in this lease deed that the defendant would pay a sum of Rs. 50 which were the arrears of rent under a previous rent note. On an examination of the lease deed it would appear that these arrears were to be paid in the course of six years from time to time without any particular determination of period and the plaintiff's remedy conceivably is only to bring a suit for that claim. That the non-payment of this money was no ground for ejectment would appear from the averments made in the lease deed. In these circumstances the plaintiff lessor is not entitled to bring a suit for possession in terms of his lease.

It is next argued that the defendant has denied the title of the plaintiff lessor in the course of this suit and, therefore, in terms of section 111, Transfer of Property Act he is liable to be ejected. Section 111

is to the effect that a lease of immovable property can be determined by forfeiture in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself. If the lessor had proved that the lessee had done so and had based his cause of action thereupon it may perhaps have been open to him to determine the lease on that ground. No such allegation has been made in the plaint nor was a notice in terms of the section given to the defendant in this behalf. The fact that a plea was taken in the course of the written statement in this suit would not entitle the plaintiff to plead forfeiture. The disclaimer of landlord's title relied on as a ground for ejecting a tenant must of necessity be made before the institution of the suit for ejectment. Such a disclaimer contained in the written statement cannot furnish a ground for a decree for ejectment. In these circumstances although the finding of fact recorded by the Courts below must be accepted the suit does not turn upon that finding. The plaintiff will be found not to be entitled to eject the defendant if the latter were to fulfil the terms of the lease. In this event the plaintiff's suit for ejectment must stand dismissed. This appeal is, therefore, allowed and the judgment of the Court below is set aside. But in the circumstances of the case the parties shall bear their own costs.

Appellate Civil.

*Before Mr. Justice Janki Nath Wazir
and
Mr. Justice Masud Hasan.*

PANDIT HARI KAUL—(DECREE-HOLDER)—APPELLANT.

Versus

PANDIT NAND LAL DAR AND ANOTHER—(JUDGMENT-DEBTORS)—RESPONDENTS.

2002

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Sawan 31

CIVIL 2ND APPEAL NO. 109 OF 2002.

Civil Procedure Code (Act X of 1997)—Section 48.—Application for execution of decree consigned to

record room—Fresh application made after 12 years from the date of the decree—Real test of a fresh application reviving previous proceedings.

The real test that an application is not a fresh application as contemplated in section 45 Civil Procedure Code, but a revival of the previous proceedings would lie in the establishment of the facts that (1) the order on the previous application gives clear indication that it has not been finally disposed of and there was nothing more for the court left to be done, (2) that it was not for any laches on the part of the decree-holder that the proceedings were struck off or consigned to the record room and (3) that the latter application is not different in its scope or character from the previous one. And the consensus of opinion is that it is not the mere form of the application that should be taken into consideration but that regard shall be paid to its substance in order to decide whether it is in continuation of the previous application or is a fresh application.

3 J. & K. L. R. 97 approved ;

A. I. R. 1940 Patna, 432, referred to.

APPEAL FROM THE DECISION OF THE DISTRICT JUDGE SRINAGAR, (LALA BARKAT RAI) DATED 31ST CHET 2001.

MESSRS. SUNDER LAL AND JIA LAL KILAM—For the Appellant.

MR. AMAR NATH RAINA—For the Respondents.

Per Masud Hasan J.—This second appeal arises out of execution matter and is the decree-holder's appeal. It arises in the following manner :—

There was a decree for Rs. 1,995 with costs obtained by the decree-holder against the judgment-debtors on 7th *Har* 1981. Various applications for the execution of this decree were made—the first on 3rd *Katik* 1981. The applications were consigned to the record room, or struck off from time to time by the executing court on one ground or the other. On 15th *Jeth* 1991 an application was preferred in which three prayers were made by the decree-holder, namely (1) attachment and sale of the movable

property, (2) attachment and sale of the immovable property and (3) detention of the judgment-debtor in civil prison till the realisation of the decretal amount. In the course of this application, it appears, certain standing crops were attached and sold and Rs. 82 were realised which were deposited in court. On 28th Phagan 1992 the court passed an order that this sum be paid to the decree-holder after disbursing the fees of the Nazir and that the application be consigned to the Record Room. The words used in this behalf being *misal zaruri tour par dakhal daftar howe*. On 25th Bhadon 1993 the decree-holder put in an application in which he repeated the reliefs which he had claimed in the application of 15th Jeth 1991. It may be stated here that with the application of 15th Jeth 1991 the decree-holder had not appended any list of property either movable or immovable which he wanted to be attached and sold. In the application of 25th Bhadon 1993 he appended these lists also. In connection with this application the judgment-debtors preferred various objections. They said that no credit had been given for certain payments in kind which had been made by them and urged that the decretal amount should be made payable in instalments in conformity with the provisions of the Agriculturists' Relief Act. It was also pleaded that the residential house was not liable to sale being protected under section 60, C. P. Code. No decision was arrived at upon these objections and they were repeated in a later application in which a fresh objection with regard to limitation was advanced and it was pleaded that the application of 25th Bhadon 1993 was barred by time having been preferred more than 12 years after the passing of the decree, *i.e.*, 7th Har 1981. This objection it would appear was taken in terms of section 48, C. P. Code. On 28th Poh 1999 the executing court decided the objection with regard to the claim of instalments under the Agriculturists' Relief Act. This matter which was decided against the judgment-debtors was taken ultimately to the High Court which on 14th Har 2002 agreed with the executing court and dismissed the judgment-debtors' objection. Thereafter the execution court on 12th Magh 2000 took up the remaining objections and decided them against the judgment-debtors. On appeal the District Judge referred the

case to the High Court for a transfer from his court on the ground that in some other case he had decided the point whether Nand Lal, judgment-debtor, was an agriculturist or not in his favour. Ultimately, however this objection on the part of the District Judge was repelled and he was asked to decide the matter on merits. The District Judge did not take up the matter of instalments on the ground that it would not arise in view of the finding he recorded on the question of limitation. He held that the application was barred by time in terms of section 48, Civil Procedure Code, as it was referred more than 12 years after the decree. This appeal is directed against this order.

In arriving at a finding in favour of the judgment-debtors on the question of limitation the District Judge regarded the application of 25th *Bhadon* 1993 as a fresh application. He was of the opinion that the previous application was not revived by this application but that it was entirely a new proceeding.

On behalf of the appellant it is contended that the order dated 28th *Phagan* 1992 consigning proceedings to Records should not be interpreted to be one disposing of the application finally and that where such an order is passed the proceedings are not finally disposed of but that the decree-holder has a right to revive them by a latter application. This point has been the subject-matter of a large number of rulings of the British India High Courts. The position that emerges is that the real test that an application is not a fresh application as contemplated in section 48, Civil Procedure Code, but a revival of the previous proceedings would lie in the establishment of the facts that (1) the order on the previous application gives clear indication that it has not been finally disposed of and there was nothing more for the court left to be done, (2) that it was not for any laches on the part of the decree-holder that the proceedings were struck off or consigned to the Record Room and (3) that the latter application is not different in its scope or character from the previous one. And the consensus of opinion is that it is not the mere form of the application that should be taken into consideration but that regard shall be

paid to its substance in order to decide whether it is in continuation of the previous application or is a fresh application. Our attention is directed to a Single Judge ruling of this court contained in *Dukan Prabdiar Attar Chand versus Nand Lal III J. & K. L. R.*, 1997. That ruling followed a Full Bench case of the Allahabad High Court contained in *Chhottar Singh and another versus Kamal Singh and others A. I. R.* 1927 Allahabad 16. The matter has since been further clarified by more recent rulings of various courts and although a number of them have been cited on behalf of the appellant it would be sufficient to refer only to that contained in *Harihar Gir versus Mst. Dulhin and others A. I. R.* 1940 Patna 432. In this case their Lordships of the Patna High Court if we may say so with great respect, took pains to gather the views taken by the various High Courts on this question as also the recent Privy Council rulings and laid down the test adumbrated above. Their Lordships observed: "In this state of the authorities, we must hold that regard is to be had to substance rather than to the form of the application. The second application will not, however, be considered to be a continuation of the former one if it is found to be different in its scope, or if the former execution is found to have been abandoned by the decree-holder or to have been dismissed through his default or laches."

On behalf of the respondent, on the strength of certain rulings, it is argued that where the property proceeded against is different in the latter application, it cannot be said to be in continuation of the previous application. We need not quarrel with this proposition because if there is anything in the application in question which would in substance go to distinguish it from the previous application either in its scope or character it could not be deemed to be in continuation of the previous application but would be regarded a fresh application. The point stressed in this behalf is that whereas in the previous application no list of the property was attached, in the subsequent application of 25th *Bhadon* 1993 such list was attached and on this basis it is claimed that it would come within the ratio laid down in *Maharaja Bahadur Ram Ranbijaya Prasad Singh versus Kesho Prasad Singh and another*, A. I. R. 1940 Patna 571

and must be taken to be a fresh application. We entirely agree with the principle laid down in this ruling, *i.e.*, that if it is sought to proceed against properties other than those mentioned in the first execution application, the latter application must be deemed to be a fresh application. But in the present case it will be found that the latter application is only in continuation of the previous application and not a fresh one in as much as what has been supplied in the latter application is only the list which should have been provided in the first. It has been conceded before us that if in the course of the previous application which was not accompanied with the list the court had asked the applicant to furnish a list and such list had been furnished that circumstances would not have converted the application supplying the list as a fresh application. We fail to see any difference.

Reliance has further been placed on Order 21, Rule 13, Civil Procedure Code which requires that a decree-holder in making an application for execution must conform to various requirements laid down therein one of which is that he must give a list of the property which he wants to be attached or sold. In our opinion the action of the decree-holder in furnishing the list in the subsequent application will not be in contravention of this provision. At best it would mean only this that whereas full details were not given in the first application they were furnished later. If on the other hand the previous application had been dismissed by the court on the ground that it was not in conformity with the provisions of the Civil Procedure Code in that behalf that would have been a different matter. Here the application had not been dismissed for any default of the decree-holder but had been consigned to the Record Room ; in other words the court treated it in a state of suspended animation because a part of the sum was realised and it was open to the decree-holder to revive it at any time and repeat the prayers that were contained in the previous application.

In these circumstances we are of the opinion that the test as laid down by the various rulings has been fulfilled and that judged by that test the application of 25th *Bhadon* 1993 cannot be said to be

a fresh application to be hit adversely by the provisions of Section 48, Civil Procedure Code, but that it must be deemed to be an application in continuation of that of 15th *Jeth* 1991 and in that event it would not be barred by time. We will, therefore, set aside the order of the lower Court and send the case back to it for disposal of the other points in accordance with law.

Appellate Civil.

Before the Chief Justice (R. B. Ganga Nath)

and

Mr. Justice Janki Nath Wazir.

ANWAR BAT AND OTHERS—(DEFENDANTS)—
APPELLANTS.

Versus

MUNAWAR BHAT—(PLAINTIFF)—
KHALIQ RATHER AND OTHERS— } RESPONDENTS. 2002
(DEFENDANTS).

Assuj 3

Right of Prior Purchase Act (II of 1993)—Vendees joining a stranger with them in purchasing the land—One indivisible sale—Effect.

A vendee by associating with himself a person who has no right of pre-emption loses his right to resist the claim of a pre-emptor. Where a sale-deed specifies only the area sold to each of the vendees, but makes no mention of the price to be paid by each of them, there is only one indivisible sale.

APPEAL FROM THE DECISION OF THE DISTRICT JUDGE, SRINAGAR (LALA BARKAT RAI) DATED 31ST *Har* 2002.

MR. A. N. KAK—For the Appellants.

MR. MADSUDHAN KAK—For the Respondents.

Per J. N. Wazir J.—This is defendants' second appeal and arises out of a suit instituted by plaintiffs

for pre-empting a sale made by defendant Nos. 1—4 in favour of defendants Nos. 5—9 of 13 *kanals* and 6 *marlas* of land comprising of *Khewat* Nos. 12 and 5 in village Lalgam, Tehsil Pulwama. The plaintiffs alleged that they have prior right to purchase the land, that defendants Nos. 1—4 sold this land in favour of defendants Nos. 5—9 for Rs. 250 and not for Rs. 300 as alleged in the sale deed and lastly that the defendants had included a stranger among the vendees and therefore they had lost their right of prior purchase. The defendants vendees resisted the suit on the ground that the plaintiffs had no prior right to purchase the land, that they had waived the right and that the price mentioned in the sale-deed was the actual price paid by the vendees to the vendors. The trial court came to the conclusion that there was no waiver on the part of the plaintiffs, that the vendees had joined a stranger with them in purchasing the land and therefore the plaintiffs had prior right to purchase the land. The plaintiffs' suit was decreed on payment of Rs. 300 to the defendants vendees. The defendants went up in appeal and the learned District Judge affirmed the findings of the trial court and dismissed their appeal. They have come up in further appeal to this court.

The main question argued on behalf of the defendants appellants is that joining of a stranger is not material in this case as the defendants had equal right to purchase the land with the plaintiffs and that the lower appellate Court was wrong in decreeing the plaintiffs' suit. It is argued that in the sale-deed the shares of the strangers are defined and the price which the strangers had to pay would be ascertained and therefore the shares of the other defendants would not be affected as the sale was a divisible one. We have perused the sale deed and in our opinion the contention of the counsel for the appellants is without force. From the sale deed it appears that the shares of the vendees are defined but the price which has been paid by the vendees is paid in lump sum and it cannot be ascertained as to how much price is paid by each vendee to the vendors. The learned counsel for the appellants has relied upon a ruling of the Lahore High Court which is reported as *Totaram versus Kundan* 112 I. C. page 704. We have

gone through this ruling and in our opinion this ruling is against the contention made on behalf of the appellants. It is laid down in this ruling that "A vendee by associating with himself a person who has no right of pre-emption loses his right to resist the claim of a pre-emptor. Where a sale-deed specifies only the area sold to each of the vendees, but makes no mention of the price to be paid by each of them, there is only one indivisible sale." In the present case as pointed out above the share of the vendees have been specified but the price has been paid in lump and it cannot be ascertained as to how much price had been paid by each vendee to the vendors. Both the courts below have rightly come to the conclusion that the defendants having joined a stranger had lost their equal right which they had to purchase the land.

It has been further contended that the plaintiffs had waived their right. The evidence produced by the defendants does not substantiate this plea. Both the courts have unanimously found that the plea of waiver has not been proved by the defendants. We agree with this finding.

In the result there is no force in this appeal which is dismissed with costs.

Appellate Criminal.

Before Mr. Justice Masud Hasan.

ALI HAIDER KHAN—(ACCUSED)—APPELLANT.
Versus
 STATE.—RESPONDENT.

CRIMINAL 2ND APPEAL NO. 69 OF 2001.

2002

Baisakh
 12

Criminal trial—Medical evidence—Duty of medical officers as experts.

Whatever the measure of Co-operation required between the various services in the State it is no part of the duty of experts to seek to conform their opinion to the results of the investigation of the Police. It will be difficult to treat with respect or place reliance on the opinion of Medical Officers in criminal cases if it is tainted with this tendency.

APPEAL AGAINST THE ORDER OF SESSIONS
JUDGE POONCH (A. H. DURRANI) DATED 11TH
Phagan 2001.

MR. RAM NATH LANGER—For the Appellant.
ASSTT. ADVOCATE GENERAL—For the Respondent.

A very unfortunate and serious mistake has been committed in the decision of this case. In this case the appellant Ali Haider Khan of village Narakot, Poonch, has been convicted under section 307 Ranbir Penal Code and sentenced to four years' rigorous imprisonment and Rs. 10 fine for attempting to cause the death of one Mohd. Khaqan of the same village. Ali Haider Khan is Mohd. Khaqan's brother's brother-in-law and there is other relationship also between the parties. It is alleged that on 21st Sawan 2001 in the afternoon the cattle of Mohd. Khaqan trespassed into the field of Mst. Nashata Begum and there was some exchange of abuse between these two. Mst. Nashata Begum is Ali Haider Khan's sister and he upbraided her for quarelling with Mohd. Khaqan. Mohd. Khaqan retired into the house of his brother Ali Akbar which happened to be opposite to that of the accused Ali Haider Khan and from there also, it appears the exchange of abuse continued. The prosecution story then is that in the course of this alternation Ali Haider Khan took out his gun and fired at Mohd. Khaqan. The distance from which this gun was fired is alleged by the prosecution to be about 60 yards. Mohd. Khaqan was hit in the left foot near the dorsal aspect.

The first information report of this occurrence was made in the Police Station Dhirkote at 9 P.M.,

on the same day. The Police Station is at a distance of 8 miles from village Narakote. On the 23rd of *Sawan* Mohd. Khaqan was medically examined and was found to have injuries on his left foot which were described by the Medical Officer Dhirkote as follows :—

There are two lacerated contused wounds, one the dorsum of his left foot and one on the same foot below the lateral malleolus. The edges are turned inwards. There is inflammation of the whole foot. There is scorching and blackening of the skin round these wounds.

On examination I found that the tendons of the following muscles are torn—

- (a) Ext. Long. Digitorum.
- (b) Peronius Tertius.
- (c) Peronius Brevius.
- (d) Peronius Longus.

and Annular Ligament is torn. The neck and the head of the Astragalus is broken and there is perforation of the cuboid and Navicular bone. The orifice of entry is smaller in circumference and the orifice of exit is wider apart than the orifice of entry."

The prosecution has produced Ali Akbar brother of Mohd. Khaqan, *Mst.* Roshan Jan, wife of the accused and sister of the complainants, *Mst.* Nashata Begum, Wali Mohd., Mohd. Feroze, Abdul Rehman and Amir Haider. The relationship of Ali Akbar, *Mst.* Roshan Jan and *Mst.* Nashata Begum has been mentioned above. Wali Mohd. and Mohd. Feroze are also collaterals of the parties. Abdul Rehman and Amir Haider are neighbours and do not appear to be related either to the one or the other party.

The Courts below have not relied upon the evidence of Wali Mohd. and Mohd. Feroze who said in the first instance that they came on the scene after the gun was fired and improved upon their statements in the course of the trial to the extent that it was fired in their presence. Nashata Begum's evidence is also not helpful to the prosecution case as she said she had gone away before the incident of the gun firing.

Reliance, in the main, has been placed upon the evidence of Abdul Rehman and Amir Haider who appear in this case to be unconnected and independent. The prosecution evidence may be said to be to the effect that the accused Ali Haider Khan fired the gun from in front of his room at Mohd. Khaqan who was at a distance of approximately 60 yards from him. This is the story of the witnesses who claim to have seen the occurrence from the very beginning and this is the inference from the evidence of such of those who said that they arrived on the scene after the gun was fired.

In defence the appellant admitted the genesis of the occurrence as being the same as alleged by the prosecution. With regard to the firing of the gun, however, the appellant says that it was Ali Akbar the brother of Mohd. Khaqan, who took out the gun from his room in the course of the quarrel that was going on and that he wanted to fire at him but Mohd. Khaqan tried to dissuade him and snatch away the gun from him and in the struggle the gun that was pointed below went off and struck Mohd. Khaqan's left foot. There is evidence in support of this version but it has not been believed.

In a matter like this the attention of the courts below should have directed itself pointedly to the description of the wound given in the Medical Officer's report and the distance from which the gun was alleged to have been fired. From the injury report cited above it will be noticed that there were marks of scorching and blackening of the skin round the wounds. A very cursory familiarity with fire arms and the nature of the wounds they cause should have led to the inference that such wounds could not have been caused from anything like the distance alleged by the prosecution. The significance of this circumstance occurred itself to the Police who made an enquiry from the Medical Officer about his opinion on the point of distance from which the gun, in these circumstances, was expected to be fired and strangely enough the Medical Officer said that such wounds could be caused from a distance of about 60 yards. This can be characterised as nothing but arrant nonsense and coming from a Medical Officer it is

nothing but reprehensible. Either the Medical Officer had not the slightest notion of what he was about or he is appallingly ignorant of even the elementary knowledge requisite for the efficient discharge of his responsible duties. It is a matter of great regret that the attention of the courts below was not directed to this very important aspect of the case. This glaring incongruity would give rise to a doubt which would throw its shadow upon the shoal aspect of the prosecution case and it was, therefore, considered necessary to invite the opinion of the Director of Medical Services, Jammu and Kashmir State, on this point. His report has been obtained and he was called as a witness by this Court to verify it. As was only to be expected he said "keeping in view the injuries mentioned in this report I am of opinion that these could not probably have been caused by the *Topidar* Gun in question if it was fired from a distance of 60 yards as stated by the said Medical Officer. While on the contrary I am inclined to think that such extensive injuries might have resulted from the gun having been fired from a very close range—say within a few inches or so of the body." This makes sense and is vastly in contradiction with the opinion given by the Medical Officer of Dhirkote on a subsequent requisition by the Police. It may be impressed at this stage that whatever the measure of co-operation required between the various services in the State it is no part of the duty of experts to seek to conform their opinion to the results of the investigation of the Police. It will be difficult to treat with respect or place reliance on the opinion of Medical Officers in criminal cases if it is tainted with this tendency.

After the opinion of the Director of Medical Services the learned Crown Counsel has stated frankly that in these circumstances the case for the prosecution cannot be supported. Nor can any other view be taken and I would like this judgment to be brought particularly to the notice of the courts below who have decided this case to note the enormity of their omission. This judgment will also be brought to the notice of his Lordship the Chief Justice for initiating such disciplinary action as he may deem fit against the Medical Officer concerned.

In these circumstances it is not possible to believe the prosecution story. This appeal is allowed. This conviction is set aside and the appellant shall be set at liberty forthwith unless wanted in connection with some other case.

Appellate Criminal.

Before Mr. Justice Masud Hasan.

VIDH LAL—(ACCUSED)—APPELLANT.

Versus

STATE—RESPONDENT.

2002

Sawan 26

CRIMINAL 2ND APPEAL No. 43 OF 2002.

Defence Rules 1996—Rule 65—Punishment.*

Unabashed Profiteering eats into the very vitals of economic life of the society. It is difficult to catch hold of culprits who are also big traders and when they are once caught the retribution should not, in the slightest degree, be allowed to flicker by false notions of mercy.

APPEAL AGAINST THE ORDER OF THE SESSIONS JUDGE, SRINAGAR (LALA BARKAT RAI) DATED 16TH BAISAKH 2002.

MR. S. N. DAR—For the Appellant.

ASSISTANT ADVOCATE GENERAL—For the Respondent.

L. Des Raj, Sub-Inspector on the material date attached to the Police Station, Shergarhi, deserves a certificate of merit for un-earthing this crime. It is stated that at 11 P.M. on the 1st of *Poh* 2001 the Sub-Inspector was on his beat when he noticed a Tonga going without lights. It had one Ghulam Rasool a shop keeper of Anantnag, as passenger and on close inspection there were found 18 tins of kerosene oil in it. Ghulam Rasool told the Sub-Inspector that he had purchased the tins from the shop of the appellant in Haba Kadal. It transpired that the appellant had

charged Ghulam Rasul Rs. 22 per tin whereas the controlled rate was between Rs. 8-12-0 and Rs. 9-2-0 per tin. In these circumstances the appellant was put on his trial under Rule 65 of the Jammu and Kashmir Defence Rules. He was convicted and sentenced by the trial court to pay a fine of Rs. 700. On appeal his conviction and sentence were maintained.

The appellant denied selling the tins and said that there was enmity between him and Ghulam Rasul over some sale of cigarettes. This story has not even the merit of plausibility because the circumstances in which Ghulam Rasul himself was apprehended do not admit of the possibility of his bringing the matter to the notice of the Police in order to wreck vengeance upon the appellant. Ghulam Rasul had told the Sub-Inspector that the appellant had provided 8 tins from his own shop and had brought 10 from the house of his sister a little distance from his shop. The Sub-Inspector energetically trailed the scent then and there and obtained confirmation.

The story for the prosecution is corroborated by the evidence of Asad Lone, the Tonga driver, who says that he was called up by the appellant and was asked by him and Ghulam Rasul to carry the tins but was told that they contained honey. Seth Kashmiri Lal corroborates the Tonga driver. The Assistant Controller proves the rate fixed by the Government for this commodity. On this evidence there is no manner of doubt that the offence has been brought home to the appellant.

The only argument advanced on behalf of the appellant is that there is not adequate proof as to whether the tins were sold by the appellant, the solitary witness in that behalf being Ghulam Rasul who must be treated to be in the category of an accomplice. In the first instance there is no rebuttal of this evidence. Secondly, it is amply corroborated by the implications arising out of the evidence of the Tonga driver that the tins were loaded at the shop of the appellant and that of the evidence of Kashmiri Lal. It is further argued that the fine imposed is very excessive. My regret is that the punishment

awarded is very lenient. There should have been more fine and there should also have been a sentence of imprisonment. Unabashed profiteering of this description eats into the very vitals of the economic life of the society. It is difficult to catch hold of culprits like the appellant and when they are once caught the retribution should not, in the slightest degree, be allowed to flicker by false notions of mercy. It is also regrettable that Ghulam Rasul was not preceeded with. He himself is a shopkeeper and in all probability he must have purchased this oil to make still more profit and fleece the public.

This appeal is dismissed.

Revisional Criminal.

Before Mr. Justice Masud Hasan.

PT. GOWASHA LAL—(ACCUSED)—APPLICANT.

Versus

STATE—OPPOSITE-PARTY.

L. KISHORI LAL—(ACCUSED)—APPLICANT.

Versus

STATE—OPPOSITE-PARTY.

L. KISHORI LAL—(ACCUSED)—APPLICANT.

Versus

STATE—NON-APPLICANT.

CRIMINAL REVISIONS NOS. 37, 38 & 39 OF 2002.

Defence Rules 1996—Rules 40 (2) (d), 117 (b), and 118—Voluntary obstruction or resistance to impede or interfere with any officer or making any statement likely to mislead any person in the discharge of any lawful function in connection with the defence of British India or the State or the securing of the public safety—Misuse of Defence Rules explained.

To bring a case under these rules it is essential to allege that the act done or the statement made was likely to obstruct any person in the discharge of any lawful functions in connection with the defence of British India or the State or securing of the public safety : and that obstruction or resistance was given to any authority etc., in the exercise of powers or duties conferred in pursuance of these Rules or in the discharge of function in connection with the defence of British India or the State and the efficient prosecution of war.

If a person approaches the State Rationing Authority to complain about the refusal of grant of petrol by the Area Rationing Authority and thinks that he has a legitimate grievance in this behalf, it cannot be assumed that this action will affect in any way the defence of British India or the State or would tend to make public safety insecure.

There have been frequent endeavours to misuse the Defence Rules by making them to do service for purpose wholly extraneous to their real scope and intent.

A. I. R. 1945 Lahore, 154 referred to.

REVISIONS AGAINST THE ORDERS OF ADDITIONAL DISTRICT MAGISTRATE SRINAGAR (PANDIT MUNNA LAL SHARMA) DATED 31ST *Har* AND 23RD *Har* 2002).

MESSRS A. N. KAK AND SATYA PAL—For the Applicants.

ASSISTANT ADVOCATE GENERAL—For the Opposite Party.

These three applications in criminal revision may be disposed of together. Although they arise out of separate cases they emerge from the same First Information Report lodged by the same complainant and involve consideration of the same points.

The applications are directed against charges framed by the trial Court against the applicants under Rules 40 (2) (d)/118 and 117 (b)/118 of the Rules made under the Jammu and Kashmir Defence Act. It is prayed that these charges may be quashed.

Criminal revision No. 39 arises out of a case under Rule 40 (2) (d)/118 and Nos. 37 and 38 out of cases under Rules 117 (b)/118.

It appears that as far back as September 1942 some petrol was given to L. Kishori Lal applicant in criminal revisions Nos. 38 and 39 for a Motor Journey to the Punjab. Two routes connect Srinagar with the Punjab one *via* Jammu and another *via* Rawalpindi and the accusation of the Petrol Rationing Authorities was that the Petrol taken was meant to be used *via* the Jammu route but the other route was taken and this amounted to misuse of the Petrol granted. After this occurrence when the applicant on his return demanded supplementary petrol ration he was refused on the ground that petrol could not be issued to him unless he produced a certificate from the Rationing Authorities of the Punjab for bringing his car in the State. It may be stated here that the applicant in these cases is a person who ordinarily carries on business in the State; it is not denied that his place of business is in Srinagar. On refusal the applicant approached the State Rationing Authority (Mr. Bell at the time) and complained against the Area Rationing Authority (Mr. Thappa the Complainant in the cases) for not giving him the petrol required. It is stated that he alleged that petrol was refused to him only to cause harassment and that there was some 'background' for this harassment. Revision Nos. 39 of 2002 arises only out of these allegations.

The other part of the prosecution story is that L. Kishori Lal approached one Mr. Mangal Sen and tried to send some message to Mr. Thappa through him to the effect that it was wrong of Mr. Thappa to refuse petrol to L. Kishori Lal and that he would start propaganda in the Press against Mr. Thappa and threatened to visit him with dire consequences. This message though not conveyed by Mr. Mangal Sen to the complainant is claimed by him to have reached his ears and the case contained in application No. 38 arises out of this matter.

The case emerging out of the third application (No. 37 of 2002) is against one Pt. Gwash Lal editor

of a local paper and is to the effect that he approached Mr. Thappa on behalf of L. Kishori Lal the applicant in the other two cases and remonstrated with him for not giving L. Kishori Lal petrol and also repeated the threats which were the subject matters of the case in application No. 38 of 2002.

These cases were initiated on a report submitted by Mr. Thappa. This document is too verbose and indeed in parts far too irrelevant to be reproduced in full. In order to illustrate the nature of the information laid, it will be sufficient, however, to give a brief resume of the narrative submitted by Mr. Thappa. After describing the circumstances under which the supply of petrol was refused to L. Kishori Lal, Mr. Thappa says that after such refusal L. Kishori Lal mentioned to L. Mangal Sen "a retired Superintendent of the Forest Department who was in these days working as Superintendent of the Forest Association of which this Kishori Lal was the Secretary and the former used to bring his applications and other letter to my office in connection with his request for petrol" that "if I did not give him the petrol, he would start an extensive propaganda against me in the Press and that he had earmarked Rs. 10,000 for that purpose." Mangal Sen did not convey this "threat" to the complainant but that he "came to know about this from other sources and on enquiries from Mangal Sen the latter told me that Kishori Lal had actually held out that threat but he (Mangal Sen) declined to convey his message to me." This part of the First Information Report may be said to be the subject-matter of the case out of which revision No. 38 of 2002 arises. Mr. Thappa goes in to say that after L. Kishori Lal was required by the State Rationing Authority to show cause why he should not be prosecuted for mis-using the petrol which he obtained in September 1942 "he became wild and went about threatening me with harm in diverse ways" and that he "approached the State Rationing Authority personally one day and *inter alia*, told him that I was unnecessarily harassing him by refusing to give him petrol and that there was a back-ground to all that." Mr. Bell it was stated, told L. Kishori Lal that all action in that connection had been taken at the instance of the State Rationing

Authority itself and that the petrol could not be given to him without producing the requisite certificate and further that the allegations that were made against Mr. Thappa were false and baseless. This may be said to be the subject-matter of the other case against L. Kishori Lal covered by revision No. 39 of 2002. The rest of the document relates to the case against Pt. Gwash Lal, the applicant in revision No. 37 of 2002. Briefly stated this is to the effect that the complainant was approached by one Mr. Zutshi and Pt. Gwash Lal "one after the other with a request to talk something to me in private." This talk transpired to be about the matter of the supply of petrol to L. Kishori Lal and Mr. Zutshi was informed by the complainant to "investigate into the matter and find out the true facts for himself." Pt. Gwash Lal however told the complainant that he had grievance against him for refusing to supply petrol to his friend L. Kishori Lal. After making an attempt to talk this matter over with the complainant on the telephone Pt. Gwash Lal is stated to have approached him at his house in the afternoon on 29th September 1943. The complainant was prevailed upon to leave his bed to meet Pt. Gwash Lal and the document gives in detail the conversation *verbatim* which took place between him and Pt. Gwash Lal. This shows that Pt. Gwash Lal expatiated on the great influence which his friend (L. Kishori Lal) was supposed to wield with the Congress and the high lights of Kashmir that he was prepared to spend a large sum of money in initiating a vilifying propaganda against the complainant and in short Pt. Gwash Lal subjected the complainant to wild threats of dire consequences if the complainant did not cease to harass L. Kishori Lal and withdraw the case instituted against him. The complainant's reaction to these threats was to tell Pt. Gwash Lal "that you are living in a fools paradise if you consider that I am going to succumb such threats or intimidation. Your Kishori Lal may have the backing of the Indian National Congress or he may be the right hand man of Sh. Mohammad Abdulla but you may take it from me and you might tell your friend this sort of intimidation will not dissuade me from performing my duties. There may be officers, perhaps who are afraid of the sort of articles that are

published against them but not me." After more word duel it is said that R. B. Pt. Anant Ram retired Revenue Minister "who lives in the upper storey of this house had entered into this room and listened to all what I said to this man. "After all this pother," As I had to take tea outside and was in a hurry to go I went to dress up and when I came out Pt. Gwash Lal asked me if I could give him a lift up to Amirakadal to which I agreed." These three incidents according to the complainant fell within the purview of Rules 117/118 and 40 (2) (d) of the Jammu and Kashmir Defence Rules and it was prayed that action may be taken under these rules.

This report was addressed by Mr. Thappa to the Inspector General of Police on 14th October 1943 who sent it to the Senior Superintendent of Police with the following endorsement "Will you please have cases registered and investigated." The Senior Superintendent thereupon sent it to the Officer in charge of the Police Station, Shergarhi, with the direction that it may be treated as the First Information Report and that the three cases detailed above may be registered. It transpired that L. Kishori Lal was discharged in the case instituted against him for the misuse of petrol referred to above. Charges were framed in the three cases.

The two charges against L. Kishori Lal are (1) that he approached Mr. Bell the State Rationing Authority and lodged a complaint about Mr. Thappa the Special Area Rationing Authority to the effect that the latter harassed him because of his personal enmity and did not give petrol and thus he tried to mislead Mr. Bell and thereby committed an offence punishable under rule 40 (2) (d) of the Jammu and Kashmir Defence Rules and (2) that he communicated through Mangal Sen a threat to Mr. Gopal Ram Thappa that he may not institute cases against him, that he (Kishori Lal) had made all arrangements and held the key of the Press in his hands, that Mr. Thappa will be brought to his senses and that Mr. Thappa had not done well in joining issue with him that even if Rs. 20,000 will be required they will spend and Mr. Thappa will be made to realise the consequences of coming in conflict with L. Kishori Lal

and thereby tried to dissuade Mr. Thappa from performing his duty and that this was punishable under Rule 117/118 of the Jammu and Kashmir Defence Rules.

The charge against the applicant Gwash Lal is that he approached Mr. Thappa at his house and threatened him that he would be defamed in the Press if he did not withdraw the case against L. Kishori Lal and that he published an article in his paper the same day being Ex. P. 1 and thus he willfully obstructed Mr. Thappa in the discharge of his official duties and thereby committed an offence punishable under Rule 117 of the Jammu and Kashmir Defence Rules.

The relevant portions of the Rules invoked may be reproduced here :—

Rule “ 40 (2). No persons shall do any act or make any statement:—

* * * * *

(d) having reasonable cause to believe that the said statement is likely to mislead any persons in the discharge of any lawful functions in connection with the defence of British India or the State or the securing of the Public safety.

* * * * *

Rule “ 117. If any person voluntarily obstructs or offers any resistance to or impedes or otherwise interferes with :—

* * * * *

(b) any authority, officer or person exercising any power or performing any duties, conferred or imposed upon it or him by or in pursuance of these rules, or otherwise discharging any lawful functions in connection with the defence of British India or the State and the efficient prosecution of the war,

* * * * *

he shall be punished * * * * *

Rule 118 is with regard to attempt or abetment or preparation of the offences contemplated in the substantive Rules.

It is almost palpably clear that these Rules have not the remotest bearing upon the allegations disclosed in the First Information Report. Assuming that every allegation made is true it is difficult to comprehend how they will fall within the mischief of these Rules. To bring a case under the Rules it is essential to allege that the act done or the statement made was likely to obstruct any person in the discharge of any lawful functions in connection with the defence of British India or the State or securing of the Public safety ; and that obstruction or resistance was given to any authority etc., in the exercise of powers or duties conferred in pursuance of these Rules or in the discharge of function in connection with the defence of British India or the State and the efficient prosecution of the war.

The charge against L. Kishori Lal under Rule 40 (2) (d)/118 is for approaching Mr. Bell and complaining against Mr. Thappa that he was animated with personal enmity in not giving him petrol and that they caused him unnecessary harassment. There is here no question of misleading any person in the discharge of any lawful functions in connection with the defence of British India or the State etc. Besides the complaint is made in an open manner and would be found to lie within the scope of the rules regarding the administration and maintenance of the supply of petrol in the State. Reference in this behalf may be made to Rule 21 of the Motor Spirit Rationing Order, 1998 made under Rule 65 of the Defence Rules. This Rule *inter alia*, provides that any person dissatisfied with the decision or order of an Area Rationing Authority in respect of the supply of motor spirit for which coupons may be granted may apply to the State Rationing Authority for revision of the decision or order and the State Rationing Authority is enjoined to dispose of the application as it thinks fit. It is also provided that this authority is not bound to accord the applicant a

hearing. This part of the case against L. Kishori Lal would amount to nothing more than approaching the State Rationing Authority to complain about the refusal of grant of petrol by the Area Rationing Authority. Indeed it is not possible to conceive of any other course adopted by a man who thinks he has a legitimate grievance in this behalf. Even supposing that the applicant was not justified in assuming that the Area Rationing Authority refused his application to allot petrol for any extraneous motives, the action cannot be said to lie outside the scope of Rule 21. In any case it cannot be assumed by any chance that the action would affect in any way the defence of British India or the State or would tend to make public safety insecure. L. Kishori Lal is not alleged to have approached the complainant in any way and in any event there is hardly any question of his misleading either him or Mr. Bell in terms of Rule 40 (2) (d). So also in the second case against L. Kishori Lal there is no connection traceable between the complainant and the applicant. Anything said to Mangal Sen can obviously be the basis of no offence against Mr. Thappa under Rule 117 and the remarks made about the applicability of Rule 40 (2) (d) would apply with greater force to the applicability of this Rule to the facts of the case. And the same consideration stands in the way of the case against Pt. Gwash Lal. The private conversation he is alleged to have with the complainant assuming it was replete with the threats and meaningless braggadocio alleged not fall within the mischief of Rule 117. The connection between this matter and the obstructions etc. to the performance of the complainant's duties in connection with "the defence of the State" and "the prosecution of the War" is so inconceivably remote as to be wholly irrelevant.

Nor from the evidence which has been led on behalf of the prosecution can it be inferred with any justification that the allegations made are even *prima facie* proved. In the case under Rule 40 (2) (d)/118 the only witnesses for the prosecution were Mr. Bell and Mr. Thappa, the complainant. Mr. Bell has definitely said that he was in no way misled by anything that was said by the applicant, that he

attached no importance to it and that he absolutely forgot it. It may be stated here that the complaint to Mr. Bell was made in June 1943 and that the First Information Report was made four months after, i.e., on 14th October 1943. All this shows that there is absolutely no substance in the matter.

In the second case against the applicant Mangal Sen has appeared and has stated that he refused to carry the message and told Kishori Lal that he would not. Mangal Sen has admitted that he is no more associated with L. Kishori Lal and it is difficult to place reliance on him.

In the case against Pt. Gwash Lal, one Hans Raj a clerk and a relation of Mr. Thappa the complainant and R. B. Pt. Anant Ram in whose house the complainant resided on the material day, have been produced. Hans Raj's evidence in the circumstances can be a matter of no consequence. R. B. Pt. Anant Ram says he was on the first floor when he heard raised voices coming from the partments which were occupied by Mr. Thappa. On coming down he found that it was the complainant and Pt. Gwash Lal talking to each other. The story of the grievance of Mr. Thappa against the applicant, L. Kishori Lal was narrated to Pt. Anant Ram by Mr. Thappa alone and the matter seems to have been so far hushed up then and there that according to the statement of Mr. Thappa he gave a lift to the applicant Gwash Lal in his own car and dropped him some distance in Amira Kadal. There is no independent corroboration of the long conversation detailed by Mr. Thappa to have taken place between him and Gwash Lal.

If Mr. Thappa had any personal grievance against either L. Kishori Lal or Pt. Gwash Lal his remedy was not to invoke the aid of the Defence of Jammu and Kashmir Rules and wreak vendetta through the Government Prosecution Agency. There have been frequent endeavours to misuse these Rules by making them to do service for purposes wholly extraneous to their real scope and intent. In the present case the perversion is reduced to a fine art. *An Azim Khan*

and another versus Emperor A. I. R. (32) 1945 Lahore, 154, there is quoted an observation of Lord Macmillan regarding the interpretation of War measures (Defence General) Regulations, (Regn. 18 B) which may well be kept in view :—

“In the first place, it is important to have in mind that the regulation in question is a war measure. This is not to say that the Courts ought to adopt in war time canons of construction different from those which they follow in peace time. The fact that the nation is at war is no justification for any relaxation of the vigilance of the Courts in seeing that the law is duly observed, especially in a matter so fundamental as the liberty of the subject. Rather the contrary. However, in a time of emergency, where the life of the whole nation is at stake, it may well be that a regulation for the defence of the realm may quite properly have a meaning which because of its drastic invasion of the liberty of the subject, the Courts would be slow to attribute to a peace time measure. The purpose of the regulation is to ensure public safety, and it is right so to interpret emergency legislation as to promote, rather than defeat, its efficacy for the defence of the realm. That is in accordance with a general rule applicable to the interpretation of all statutes or statutory regulations in peace time as well as in war time.”

I see no useful purpose in allowing these proceedings to lengthen out. In my opinion it is a case of flagrant abuse of the process of Court. Ordinarily this Court is very chary in interfering with the trial of cases at this stage but in cases like the present where proceedings are so utterly misconceived and the charges framed have no relation to the facts disclosed, it is the duty of this Court to step in. I would, therefore, accept these applications, quash the charges and set aside these proceedings.

Appellate Civil.

*Before the Chief Justice (R. B. Ganga Nath).
and*

Mr. Justice Masud Hasan.

RAZAK LONE AND OTHERS—(PLAINTIFFS)—AP-
PELLANTS.
Versus

WAZIR RATAN CHAND AND OTHERS—(DEFENDANTS 2002
RESPONDENTS.

Sawan 33

CIVIL IST APPEAL NO. 27 OF 2002.

*Right of prior purchase Act (II of 1993)—
Section 14—Persons in whom right of prior purchase
vests in respect of sales of agricultural land—Member
of a joint Hindu family is an owner.*

*A member of a joint Hindu family which owns
land in an estate can for the purpose of the Pre-emption
Act be considered an owner of the estate even if his
name does not appear in the revenue records but the
land stands in the name of the head of the family alone.*

A. I. R. 1940 Lah. 340 referred to.

APPEAL FROM THE DECISION OF THE SUBORDINATE
JUDGE BARAMULLA (MR. NAZIR AHMED SHAH)
DATED 29TH Chet 2001.

MR. A. N. BHAN—For the Appellants.

MR. SUNDER LAL—For the Respondents.

Per C. J.—This is second appeal by plaintiffs
arising out of a suit brought by them against the
defendants respondents for purchase of the property
described in the plaint by exercise of their right of

prior purchase. The property in dispute was sold by defendants 2 to 7 to defendant No. 1. The plaintiff's case was that they had a prior right of purchase. Defendant No. 1 contended that he himself was a *Khewatdar* and that the plaintiffs, had no preferential right over him. The lower Court found in favour of the defendant and dismissed the suit.

The question is whether the plaintiffs have any prior right of purchase. Out of seven plaintiffs three, namely Mohamad Sheikh, Samad Bhat and Sobhan Bhat are strangers. The mere fact that the remaining plaintiffs have joined with the strangers would defeat their suit.

It is proved by the evidence of the parties that defendant No. 1 is the son of Wazir Sarup Chand and they are members of a joint family. Sarup Chand is a *Khewatdar*. As a member of joint family defendant No. 1 would also have a share in the *Khewat*. In *Kartar Singh Versus Court of Wards Estate Raja Sir Baba Gurbaksh Bedi through Deputy Commissioner Rawalpindi and another*. A.I.R. 1940 Lahore 340, it was held :—

“The very constitution of a joint Hindu family connotes that every member has an equal right with the other members and it is immaterial whether his name is recorded or not in the revenue papers. His right is not lost on that ground and this being so, none of the privileges with which the recorded owner is clothed can be denied to the unrecorded member.

Therefore a member of a joint Hindu family which owns land in an estate can for the purposes of the Pre-emption Act be considered an owner of the estate even if his name does not appear in the revenue records but the land stands in the name of the head of the family alone.”

The defendant No. 1 is a *Khewatdar* and plaintiffs have no preferential right. There is no force in this appeal. It is dismissed with costs.

Before Mr. Justice Masud Hasan.

SHER AHMED—(ACCUSED)—APPELLANT.

Versus

STATE—RESPONDENT.

2001

Chet, 17.

CRIMINAL 1ST APPEAL NO. 46 OF 2001.

I. Criminal Procedure Code (XXIII of 1989)—
Sections 164 and 364—Confession by an accused person
—Important requirements of law while recording a
confession.

The more important requirements of law in this
behalf may be summarised as follows:—

- (1) Proper warning must be given (Section 164);
- (2) Proper questions must be resorted to (Section 164).
- (3) All the questions put and all the answers given must be recorded in full (section 364).
- (4) The confession must be recorded in the language in which it is given unless it is impracticable to do so.
- (5) The record of the confession must be shown or read over to the confessor and if he does not understand the language in which it is written then the same must be interpreted to him in the language he understands.
- (6) The record must be signed by the accused (Section 364).

2. Criminal trial—Accomplice—Value of the evidence of an accomplice.

The evidence of an accomplice, as it is, is evidence of the weakest type and even when it is legally admissible the quantum of weight to be attached to it is very limited and it is not at all safe, though not unlawful, to base a conviction upon the evidence of an accomplice only particularly when he has resiled completely from his confession.

3. Criminal trial—Accomplice—Approver—Value of the evidence of approver when confession is retracted.

The only reason for granting a pardon to an accomplice and making him an approver is that if the confession is voluntary it is made in remorse and penitence and as such must be relied upon. This consideration loses force considerably when the confession is retracted and the reason advanced for such retraction is that the confession was made under police compulsion.

4. Ranbir Penal Code (Act X of 1989)—Section 298-A—Slaughtering a bovine animal—Whether the possession of skin of a slaughtered bovine animal raises any presumption in favour of the fact of slaughtering that animal.

The disposal of possession of the skin of a slaughtered ox would neither be evidence nor raise any presumption in favour of the fact of slaughtering the ox. Under section 298-B, the possession of the flesh of a slaughtered bovine animal is an offence distinct from that of slaughtering such an animal. If the possession of the flesh of a bovine animal is insufficient to raise the presumption of slaughtering, much less is the possession of the skin of such an animal which is not even punishable in law.

APPEAL AGAINST THE ORDER OF SESSIONS JUDGE,
MIRPUR (B. N. KAUL), DATED 18TH MAGHAR 2001.

MR. AHMED YAR—For the Accused.
ASSISTANT ADVOCATE GENERAL—For the State.

In this case eleven persons were put on their trial under section 298-A Ranbir Penal Code for slaughtering an ox in village Sangar, Tehsil Bhimber, on the

9th *Phagan* 2000. The case was tried by the learned Sessions Judge Mirpur who acquitted ten of the accused persons and convicted only the appellant under that section and sentenced him to two years' rigorous imprisonment and Rs. 15 as fine.

The prosecution story, briefly stated, is that on 9th *Phagan* 2000 an ox belonging to one *Mst. Gami*, the mother-in-law of the appellant was slaughtered in the house of *Mohd. Sharif*. On 13th *Phagan* 2000 a report was made by one *Sher Ali* to the *Patwari* in whose circle this village happens to be to the effect that his own calf and *Jan Mohd's* bullock had died in the village. As required, perhaps, by rules the *Patwari* made an entry in his day book of this report. No suspicion seems to have arisen about any offence having been committed. On the 19th of *Phagan* 2000 the *Patwari* made another entry in his day book said to be made at the instance of a certain informer whose name he was not willing to disclose. This report was made to the effect that the bullock said to have died on the 13th of *Phagan* was really slaughtered and that *Sher Ahmed* and others had slaughtered it.

The police repaired to the scene on the 20th *Phagan* and started investigation. Statements of various persons were recorded and the houses of various persons were raided from where certain things, which will be immediately mentioned, were recovered. In consequence certain persons were arrested. There were recovered from the house of *Moh'd Sharif* a blood stained wooden piece and an iron chopper. The Police also discovered in a certain room of his house blood spot over the floor and over the window frames and a pillar. These blood stains were scrapped and were sent to the Chemical Examiner who forwarded them in turn to the Imperial Serologist. There was also recovered on the same day the skin of an ox alleged to be at the instance of the appellant, *Sher Ahmed*, from the possession of one *Lakhmi Chamar*. It is further stated that from the house of the appellant there were also recovered a *kulhari* and a knife both of which were blood stained. In addition to these things there were recovered from the possession of the other person two pieces of wood, a gunny bag.

a *khes* and a pen knife. These things also were stained with blood.

It may be noted here that almost all the recoveries upon which reliance has been placed on behalf of the prosecution had taken place on the 20th of *Phagan* the day on which the Police arrived in the village. On 3rd *Chet* Mohd. Sharif was put up before a Magistrate and his confession was recorded. Thereafter on 5th *Baisakh* 2001 he was granted pardon and made an approver. Before the Committing Magistrate Mohd. Sharif complained that he had made the confession because of torture and threats to which other accused persons were also subjected by the Police. In the trial before the learned Sessions Judge Mohd. Sharif completely retracted his confession and re-iterated the same reasons for making his previous statement.

The prosecution evidence in this case consists of the statement of *Mst. Nek Bibi*, wife of the approver Mohd. Sharif, *Lakhmi Chamar* of the same village, *Desraj Patwari* and *Mumtaz Ali*, a witness of recoveries together with the evidence of Dr. Asaf Khan, the Veterinary Surgeon and Th. Hari Singh, the investigating officer. *Mst. Nek Bibi* has not corroborated the prosecution case. She was treated as hostile witness and cross-examined by the prosecution. *Lakhmi Chamar* also, after part of the way corroborating the prosecution case, resiled from his statement in the course of the trial and offered an explanation as to why he made a contrary statement before. *Mumtaz Ali* is search witness. *Desraj Patwari* has proved the reports made to him as also the plan of the site drawn up by him. Dr. Asaf Khan has deposed that the skin that was recovered from the house of the appellant was that of slaughtered bullock. The Hari Singh has deposed the circumstances of the investigation.

On this evidence the learned Sessions Judge held that no case was made out against ten of the other persons who had been put on their trial under section 297-A. The reason that he gave for arriving at this finding was that there was no reliable evidence in this case except that of the approver and conviction

could not be based upon the statement of the approver only unless it was materially corroborated and that in the case of those whom he acquitted no corroboration was available. In the case of the appellant, however, he was of the opinion that such a corroboration was available.

The matter of the corroboration of the statement of the approver would arise only when there is a valid and credible statement of the approver itself on the record. While being examined in the trial before the learned Sessions Judge the approver prefaced his statement as follows :—

“muzhir ne waida muafi saza hasil kiya hai lekin police ne mar mar kar muzhir se bayan dilwaya tha muzhir ne koyie gunah nahin kiya hai aur na muzhir ne waida muafi hasil kiya hai muzhir ko is waqua ke mutaliq koyee waqfiyat nahin hai muzhir ne albateh bayan tehrir karwaya hai lekin police ne tashadeed kar ke aur muzhir ke jism men marchain chara kar bayan muzhir se tehrir karwaya muzhir ko koyee pata nahin hai.”

He thereafter repudiated the entire story that he was credited to have disclosed in his statement under Section 164, Criminal Procedure Code. He said that the ox in dispute was not slaughtered but had died. He further stated that the skin that was recovered did not belong to the ox in dispute. He said that he had been continually kept, in the lock up whereas the other accused had been released on bail. He said that the Police was with him on every occasion that he was made to make a statement and that all his previous statements were made under police compulsion. He stated that all the accused had been tortured by the Police and that he was induced to make the statement on the promise that he would be paid Rs. 20 and would be granted a pardon.

The confessional statement of the approver does not conform to any of the requirements laid down under sections 164 and 364 Criminal Procedure Code to ensure a genuine and voluntary confession of truth. This statement only bears a note by Mr. Nand Lal Mattoo Magistrate, at the top to the effect

that the accused had been produced for recording his confession and according to instructions he was kept in the Judicial lock up and after being kept again in the court room for two hours he was told that he was before a Court and if he had been subjected to any inducement or fear he was at liberty to disclose that. The constables were instructed to go out of the court room and there was no constable present in the room then. The accused said that he understood that he was before a court and that he was making the confession out of his free will. Then followed the statement in a narrative form and there is an endorsement at the end that the Magistrate thought that it was voluntarily made. The more important requirements of law in this behalf may be summarised as follows :—

- (1) Proper warning must be given (S. 164).
- (2) Proper questions must be resorted to (S. 164).
- (3) All the questions put and all the answers given must be recorded in full (S. 364).
- (4) The confession must be recorded in the language in which it is given unless it is impracticable to do so.
- (5) The record of the confession must be shown or read over to the confessor and if he does not understand the language in which it is written then the same must be interpreted to him in the language he understands.
- (6) The record must be signed by the accused (S. 364).

It will be noticed that as far as the provisions with regard to the giving of proper warning and proper questioning are concerned they have not at all been complied with. Section 364 requires that all the questions put and all the answers given must be recorded in full. This has not been done; nor does it appear whether the confession was shown to the accused or read over to him, whether it was ascertained that he understood the language in which it was written and whether it was interpreted to him

in the language which he understood. These are not mere technical omissions. These are irregularities which go to the root of the matter. It is the duty of the trial court to see that these requirements have been complied with in full and where they have not been so complied with, resort must be had to section 533 Criminal Procedure Code, Section 533 which is as follows :—

“ If any Court, before which a confession or other statement of an accused person recorded or purporting to be recorded under section 164 of section 364 is tendered or has been received in evidence, finds that any of the provisions of either of such sections have not been complied with by the Magistrate recording the statement, it shall take evidence that such person duly made the statement recorded ; and notwithstanding anything contained in the Evidence Act, 1977, section 91, such statement shall be admitted if the error has not injured the accused as to his defence on the merits.”

The document becomes admissible in evidence only when these irregularities are cured if the error does not materially prejudice the accused on merits. This aspect of the matter has not received any attention by the trial Court and the confessional statement has been admitted in evidence without complying with the mandatory provisions in this behalf. In these circumstances it is difficult to hold that the confession is voluntary and is admissible in evidence. The trial Court remarks : “ The only direct evidence about the slaughter of the animal is that of the approver, who has not only resiled from his previous statement made before the Committing Magistrate as well as those made under section 164 Criminal Procedure Code and Section 337 Criminal Procedure Code but has totally repudiated these, as mentioned above. He has no doubt stated at the trial that the previous statements were made by him at persuasion of the police, under pressure and out of fear of being subjected to torture, with which he was being threatened, and the learned counsel for the

defence has referred to his statement before the Committing Magistrate to show that in that statement also the approver frankly gave the very same reasons for making the incriminating statement against the accused. It has been contended that the approver has all along remained under Police custody and influence and therefore his statements, whether previous or subsequent, cannot for this reason also be considered to have been voluntarily made. It has been pointed out that the Magistrate recording the confession of the approver under section 164 Criminal Procedure Code did not observe the necessary instructions and precautions laid down for recording such confessions, and after the confession of the approver was recorded he was remanded back to the custody of the police and was never free from police influence. These contentions no doubt sound plausible enough, but these by themselves are not sufficient for disregarding or discarding altogether the evidence of the approver, if corroboration of the same in material particulars is forthcoming, so as to establish the commission of the offence against the accused persons." It is not at all possible to agree with this view and indeed it would be extremely dangerous if this view is allowed to prevail.

The evidence of an accomplice, as it is, is evidence of the weakest type and even when it is legally admissible the quantum of weight to be attached to it is very limited and it is not at all safe, though not unlawful, to base a conviction upon the evidence of an accomplice only particularly when he has resiled completely from his confession. This is how the courts look at the evidence of an accomplice. An accomplice is a shameless lawbreaker (1926 All. 705, A. I. R.). He is too immoral a person to be worthy of credit (A. I. R. 1925 Audh 1). He may know every circumstance of the crime; and while relating all other facts truly, may, in order to save a friend or gratify an animosity name some innocent person as one of the criminals (10. Bom. 319). Moreover, he is a friend of those who committed the crime with him, and he would much rather get them out of the scrape and fix an innocent man than his real associates (8 All. 509). Further, he gives his evidence under an express or implied guarantee that he will

not be prosecuted in respect of the offence regarding which he gives his evidence against the accused. He will, therefore, strive to see that the prosecution case succeeds and he attains the promised or expected immunity from being prosecuted (5 W. R. 80).

The only reason for granting a pardon to an accomplice and making him an approver is that if the confession is voluntary it is made in remorse and penitence and as such must be relied upon. This consideration loses force considerably when the confession is retracted and the reason advanced for such retraction is that the confession was made under police compulsion. This must give rise at once to an incisive examination of the voluntariness of the confession originally made in terms of section 24, Evidence Act. I cannot do better in this behalf than quote in extenso a very apt passage from the judgment of Niamat Ullah J., (now President of His Highness' Board of Judicial Advisers) in *Emperor versus Nazir*, A. I. R. 1933 A. 31). My only justification for transposing this somewhat extensive quotation lies in the fact that I look upon the practice, so commonly prevalent here, of the investigating officers' resorting to confessions with great apprehension and in the hope to impress upon the Magistrates and Sessions Judges having to deal with them, to keep the relevant principles prominently in view. His Lordship observed: "One however seldom comes across a case in which any serious effort is made either by the Magistrate or the Sessions Judge to explain the phenomenon that a person, who took every precaution of concealing his crime and suppressing evidence, which could implicate him, becomes so full of remorse and penitence when he comes face to face with the police that he makes a free and voluntary confession," but subsequently retracts it at the enquiry, the remorse and penitence which are supposed to have acted on his mind before, ceasing to influence it in the slightest degree. While it is true that in some cases voluntary confessions are made, and while it is permissible for police officers to resort to legitimate devices to obtain useful information from prisoners, it is inconceivable to me, as it was to Straight⁷ J. [See *Queen versus Babu Lal* 6 A. 506 (542).] that ordinarily a dacoit or

murderer would make a voluntary confession. It is therefore necessary that when a confession is first made and is subsequently retracted with allegations against the police, the Magistrate and the Sessions Judge should probe the matter for their own satisfaction. What however is done in practice is to record a confession with due formalities and subsequently to record the retraction, leaving it to the accused to get over, if he can, the effect of the confession which stands against him in spite of the retraction. It is impossible for the accused, even if he is defended, to adduce any reliable direct evidence of mal-treatment or inducement while he was in the police custody. His allegations when put to the investigating officers are naturally denied. But the matter should not be allowed to rest there. The Judge, with whom the responsibility lies for acting upon the confession, should satisfy himself by putting searching questions, to such witnesses as had anything to do with the confession. The first question that ought to strike every Judge is, 'Why the accused made the confession?' It is very important to ascertain from those in whose custody the accused was, the circumstances in which the question of the confession first arose, how the accused expressed his willingness to be placed before the Magistrate and his readiness to make the confession. Similar questions arise as regards retraction. It is only if circumstances make it reasonable to believe that the accused voluntarily made the confession and agreed to make it before the Magistrate that an inquisitive mind can be satisfied." Far from applying these or any other tests to satisfy judicial conscience it would be noticed that even the mandatory provisions of law have been disregarded in the case of this confession and I find it extremely difficult to accept it. If it had been a matter only of a mere irregularity not going to the root of the things and not prejudicing the accused on merits there was nothing in the way of curing it even at this stage but this course would be very prejudicial to the accused in view of the state of evidence on the record. The very fact that the confession was made so long after the arrest of the accused and the fact that the accused was not left alone from the police custody are circumstances

enough to raise a doubt about the genuineness of the confession even if allegations of the torture against the police are not believed in their entirety. It is remarkable that the investigating officer in this case has not been able to produce any independent evidence of the discoveries made by him in the course of his investigation. All the evidence relating to them except the formal evidence of Mumtaz Ali would give the lie to the prosecution case. The suggestion, therefore, that it was necessary to have a confession for the purpose of corroboration only is not wide of the mark. The prosecution has not dealt fairly with this case. The *Patwari* on whose report this case was challaned has refused to disclose the name of his informer and from a perusal of the evidence of the investigating officer it would appear that the accused persons had meticulously preserved the incriminating marks on the articles for more than a fortnight and were waiting for his arrival in the village to vie with each other in placing them before him. These circumstances involve the bonafides of the investigation in great suspicion and doubt.

Against Sher Ahmed, the appellant, there remains only the recovery of the skin of a slaughtered ox said to have been made at his instance from the house of Lakhmi and a blood stained knife from his house. Lakhmi P. W. from whose possession the skin was recovered has resiled from his statement before the Committing Magistrate and has belied the prosecution case in the course of the trial. Besides, the disposal or possession of the skin of a slaughtered ox would neither be evidence nor raise any presumption in favour of the fact of slaughtering the ox. Under section 298-B the possession of the flesh of a slaughtered bovine animal is an offence distinct from that of slaughtering such an animal. If the possession of the flesh of a bovine animal is insufficient to raise the presumption of slaughtering, much less is the possession of the skin of such an animal which is not even punishable in law. The recovery of a blood stained knife from the house will not, by itself, prove that the accused was the person who used it. Both these things had been recovered long before the confession of the approver and it is not claimed that

these recoveries were made at his instance. In these circumstances it is not possible to hold that the approver's statement has been corroborated in material particulars even if it could be admitted in evidence against the appellant.

This is the only differentiating feature which has weighed with the learned Sessions Judge in considering the case of the present appellant from that of the other accused persons who have been acquitted. In view of the remarks made above the distinction does not arise.— This appeal is, therefore, allowed and the conviction of the appellant is set aside. He shall be set at liberty forthwith if not wanted in connection with some other case. The fine, if paid, shall be refunded.

Appellate Civil.

*Before the Chief Justice (R. B. Ganga Nath)
and
Mr. Justice Masud Hasan.*

KESHO BAT JOTSHI—(DEFENDANT)—APPELLANT.
Versus
2002 KESHO NATH AND OTHERS—(PLAINTIFF)—RESPONDENTS.

May 26

CIVIL 2ND APPEAL NO. 32 OF 2002.

Privacy—Right of privacy—Birth right of a human being—Different from the right of privacy based on social custom.

Right of privacy is based on natural modesty and human morality which is not confined to any class, creed, colour or race and it is the birth right of a human being and is sacred and should be observed, though the right should not be observed in an oppressive way. The right of privacy based on social custom and parda

system, is quite different from the right of privacy based on natural modesty and human morality.

APPEAL FROM THE DECISION OF THE SENIOR SUB-JUDGE, KASHMIR (PT. MUNNA LAL SHARMA) DATED 17TH Maghar 2001.

MR. SUNDER LAL ADVOCATE —For the Appellant.
MR. MADHUSUDAN KAK ADVOCATE—For the Respondents.

Per Hon'ble C. J.—This is second appeal by defendant arising out of a suit brought by the plaintiff respondent against him for closing of windows, appertures, ventilators and open spaces on the ground that they interfered with the plaintiff's privacy and also for possession over a certain piece of land on the ground that it had been encroached upon by the defendant. The appellant denied that the plaintiff's privacy was interfered with by his windows, and appertures etc., and that any encroachment had been made by him. Both the lower courts concurrently found that no encroachment had been made by the defendant and dismissed the plaintiff's suit in respect of it. As regards interference found that the plaintiff's privacy was interfered with by the windows, apperture, ventilators and open spaces of the defendant.

It has been urged by learned counsel for the appellant that the plaintiff did not allege any customary right of privacy in his plaint and therefore the plaintiff was not entitled to a decree. There is no doubt that no such allegation was made in the plaint but all the same the plaintiff alleged in his plaint that his privacy was interfered with by certain constructions of the defendant. The defendant simply denied this fact. He did not contend that no customary right of privacy existed. He simply denied the fact that the plaintiff's privacy was interfered with by his windows, appertures etc. The defendant, therefore, did not join any issue on the question of existence of any customary right of privacy and he cannot be allowed to raise this point now at this stage. Right of privacy is based

on natural modesty and human morality which is not confined to any class, creed, colour, or race, and it is the birth right of a human being and is sacred and should be observed, though the right should not be observed in an oppressive way. The right of privacy based on social custom and *parda* system, is quite different from the right of privacy based on natural modesty and human morality.

As already stated it has been held by both the lower Courts concurrently that the plaintiff's privacy is being interfered with by the defendant's windows appertures, ventilators and open spaces.

The plaintiff had filed a cross-objection with regard to the decree of the lower Courts dismissing his suit for possession over the piece of land over which he alleged the defendant had encroached. As has been already stated both the lower Courts have concurrently found that no encroachment has been made by the defendant, and we agree with this finding.

There is no force in the appeal or the cross-objection. Both are dismissed with costs.

Appellate Civil.

*Before the Chief Justice (R. B. Ganga Nath),
Mr. Justice Janki Nath Wazir,
and
Mr. Justice Masud Hasan.*

KOTWAL VIDYASAGAR AND ANOTHER—(DEFENDANTS)—APPELLANTS.

Versus

KOTWAL HEMRAJ AND ANOTHER—(PLAINTIFFS)—RESPONDENTS.

CIVIL 2ND APPEAL NO. 249 OF 2000.

Hindu Law—Gift—Gift to son—Intention of donor to determine nature of property.

In cases of gift it would be the intention of the donor which must be taken into consideration in determining whether the property in the hands of his donee son should be deemed to be ancestral or self-acquired.

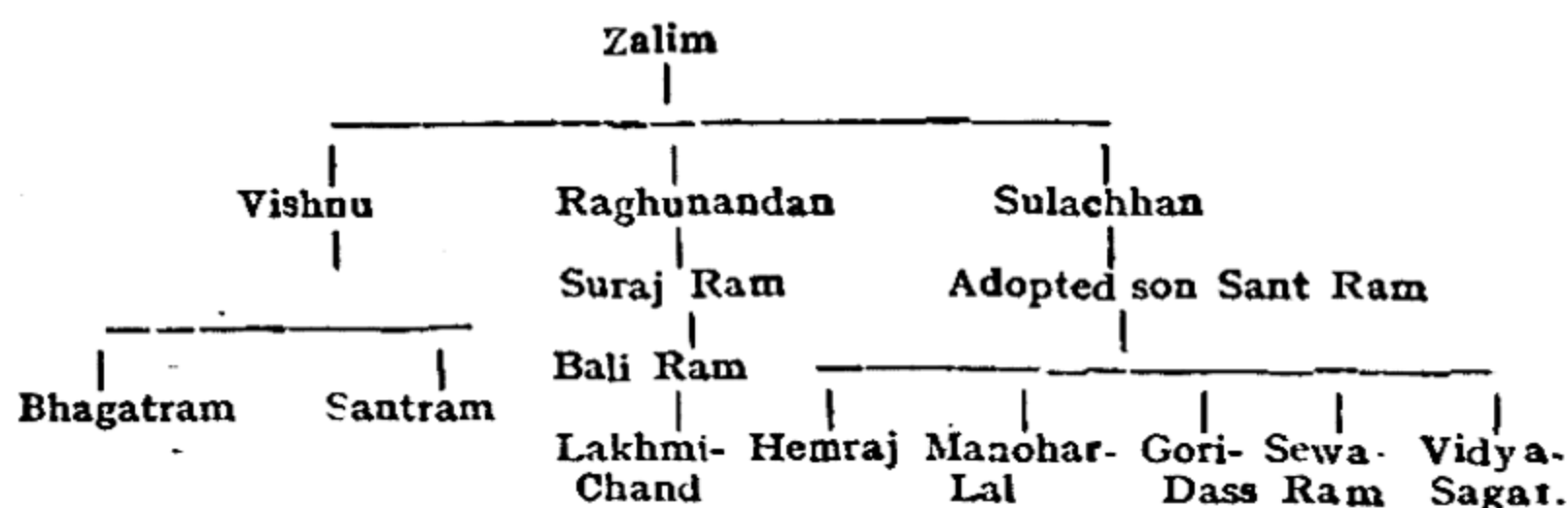
APPEAL FROM THE DECISION OF DISTRICT JUDGE, JAMMU (LALA BARKAT RAI) DATED 14TH *Maghar* 2000.

MR. CHAMAN LAL—For the Appellants.

MR. DINA NATH MAHAJAN—For the Respondents.

Per Masud Hasan J.—This is the defendants' second appeal arising out of a suit for declaration. The declaration sought was with regard to a deed of gift executed by one Sant Ram in favour of the defendant Vidayasagar on the 22nd of *Bhadon* 1996. The ground on which this declaration was sought was stated in the plaint to be that the property was ancestral and that Sant Ram had no legal right to alienate it.

In order to appreciate the controversy in this case it would be necessary to give the pedigree of the family and it is as follows :—



It will be noticed that Sulachhan one of the three sons of Zalim had no issue. He adopted Sant Ram one of the two sons of Vishnu, his brother. The remaining son of Vishnu, namely Bhagat Ram died after this adoption and at the time of his death Vishnu was also left without any son. After adopting Sant Ram, Sulachhan made a gift of the property inherited by him from his father Zalim to his adopted son Sant Ram. This was on the 14th of *Sawan* 1944. A little before his death Vishnu being left without

any son made a gift of the property falling to his share also to Sant Ram adopted son of Sulachhan. In this way Sant Ram came to possess property left both by his adoptive father Sulachhan and his real father Vishnu. Sant Ram married two wives and had five sons. To the defendant who was his youngest son he gifted the property now in dispute on the ground that he could not look after his education as he did in the case of his other sons. It is this gift which is impeached by the other two sons of Sant Ram namely Hem Raj and Manohar Lal. The power of Sant Ram to alienate by means of gift this property would depend upon the character of the property in his hands. In other words it was to be seen whether the property in the hands of Sant Ram received by him by virtue of two gifts one from Sulachhan and the other from Vishnu was ancestral or self-acquired property. In describing this property in the gift deed Sant Ram characterised the property that he was gifting over to Vidyasagar as that which he had received by means of gift from Vishnu. He has called the property which he received by gift from Sulachhan as his '*Jadi*' (ancestral property). This comprises of three items one of which is a house which was built by Sant Ram upon the site of two houses one of which he had got from Sulachhan and the other from Vishnu. The second item related to the property which he called as having been received from Vishnu and which was 145 odd *kanals* of land. The last item was of 8 *kanals* and 10 *marlas* of land which was called as self-acquired property.

Both the courts below held that Sulachhan's property in the hands of Sant Ram was ancestral property. The Court of first instance further held that the property gifted by Vishnu to Sant Ram must be deemed to be blended in the ancestral property and as such be regarded as ancestral property. To this finding also the lower appellate Court dittoed. It was in these circumstances that the gift was held to be invalid and the plaintiff's suit was decreed.

We need not detain ourselves in detail over the legal proposition. That proposition is clear enough and may be briefly stated to be as follows: That in cases of gift it would be the intention of the donor which must be taken into consideration in determining

whether the property in the hands of his donee son should be deemed to be ancestral or self-acquired. Acting upon this principle one need not go further than peruse the gift deeds in dispute in which the property gifted by Sulachhan to Sant Ram is described as ancestral. We shall, therefore, regard that property as such. In our opinion the question of blending does not arise in this case because the property was in the hands of Sant Ram alone. It will, therefore, be his own wishes which will determine whether that property was ancestral or otherwise. This property is described by him to be one which he received by gift from Vishnu as contradistinguished from the one which he calls as ancestral namely that which he received by gift from Sulachhan. This property, therefore, in our opinion, should be regarded such as can be the subject-matter of a valid gift.

The next difficulty that arose was the inability of the Courts below in determining precisely as to what was the property which was received by Sant Ram from Vishnu and in order to get a definite finding upon this question we sent down an issue to the lower Court by our order dated 12th *Chet* 2000. The issue was as follows :—

“ Whether the property in dispute which has been gifted by Sant Ram to his son Vidyasagar under gift deed dated 22nd *Bhadon* 1996 is the same as was gifted to Sant Ram by Vishnu under the gift deed dated 28th *Magh* 1956.”

The Court of first instance which was the Subordinate Judge of Bhadarwah after dealing with the evidence which was produced on behalf of the defendant and which was in the shape of two *patwaries* who had been taken by the defendant to the spot and were asked to delineate the property on a comparison with the gift deeds and on the evidence of Sant Ram himself recorded a finding in the following words “ I am, therefore, of opinion that survey No. 13 measuring 13 *marlas* situate in Kotli, Tehsil Bhadarwah, and the Nos. 751 min, 1382, 1384, 3186, 1418, 1447, 1473, 1325, 1290 min, 1297, 2582 min, 3592, 3593.

3594, 3595, 3596, 3597, 3598, 3599, 3600, 3601, 3602, and 3604 situate in Udrana, Tehsil Bhadarwah, measuring 145 *kanals* and 4 *marlas* of land, gifted by Vishnu to Sant Ram have been gifted by the latter to Vidyasagar." The learned lower appellate Court, for reasons which are not quite intelligible to us, has not endorsed this report nor has it given any finding of its own. It has contented itself by saying "There is no doubt that a portion of the area received by Sant Ram from Vishnu appears to have been given over by him to Vidyasagar. But it is difficult to demarcate with precision the area which Sant Ram received from Vishnu and gave it over to Vidyasagar. In the face of the finding arrived at by the first Court based as it is upon the evidence which was led after remand we have not been able to appreciate this difficulty. We have heard learned counsel upon this additional evidence and we are of the opinion that the report of the first Court must be accepted.

Of the three items of property described above, the house, as has been stated above, was built by Sant Ram on the site which he had received both from Sulachhan and Vishnu in moiety. The house on the spot is now one indivisible house and has been gifted away to Vidyasagar. If the property gifted to Sant Ram by Sulachhan has to be excluded it would appear that half the site upon which the house stands was not one which was gifted by Vishnu to Sant Ram and a provision with regard to it must be made. The property gifted by Vishnu which is stated to be 145 odd *kanals* in the lower Court's report has been traced to our satisfaction. The last item consists of 8 *kanals* and 10 *marlas* and is comprised of 13 *marlas* included in the sale-deed in favour of Sant Ram and the remaining as received by him in exchange from one Amar Singh. It may be stated here that this exchange was in lieu of a mare to distinguish it from another exchange which is included in the second item. These are the items of property which formed the subject matter of the deed of gift dated 22nd *Bhadon* 1996 and have been fully traced. The plaintiffs' therefore, are not entitled to declaration claimed.

It may, however, be stated that half of the site on which the house (item No. 1) stands must be deemed to be inalienable being ancestral property. Still the appellant Vidyasagar also has a share in it as well as in the other property left by Sant Ram. The house, therefore, shall remain with the appellant and the half site in question shall be adjusted from the appellant's own share in it and in the other property at the time of partition. Subject to this qualification the plaintiff's suit is dismissed with costs.

Appellate Civil.

*Before the Chief Justice (R. B. Ganga Nath),
Mr. Justice Janki Nath Wazir
and
Mr. Justice Masud Hasan.*

MUNNA KHAN AND OTHERS—(DEFENDANTS)—AP-
PELLANTS.

Versus

SULTAN RAHMAT ULLAH KHAN—(PLAINTIFF)—
RESPONDENT.

2002

Bhadon, 5

CIVIL 1ST APPEAL No. 275 OF 2001.

Civil Procedure Code (Act X of 1977)—Res-judicata—Whether a suit for possession by redemption bars a suit for possession on the basis of ownership.

Held that such a suit is not barred.

It is a well established principle that a plea based on facts which did not exist at the time of former suit

but which came into existence subsequently cannot be said to be one which might have been raised in the former suit.

APPEAL FROM THE DECISION OF THE DISTRICT JUDGE SRINAGAR (LALA BARKAT RAI) DATED 25TH Saeen 2001.

MR. SATYA PAI—For the Appellants.

MR. AHMED YAR—For the Respondent.

Per Hon'ble J. N. Wazir—This is defendants' appeal and arises out of a suit instituted by the plaintiff Sultan Rahmatullah Khan for possession of 9 *kanals* and 19 *marlas* of land comprised of *Khewat* No. 4 situate in village Kulseer Tehsil Muzaffarabad. The plaintiff's case was that the land comprised of *Khewat* No. 3 and 4 belonged to one Sikandar Khan who had mortgaged the same to one Jamd Ali the ancestor of the defendants respondents, that after the death of Sikandar Khan his widow Mst. Khushala transferred the entire land comprised of *Khewats* Nos. 3 and 4 to Sultan Rahmatullah Khan plaintiff, that the plaintiff had already recovered possession of 35 *kanals* of land comprising of *Khewat* No. 4 in a previous suit which was filed for possession by redemption but that the plaintiffs could not succeed in getting possession of 9 *kanals* and 19 *marlas* of land in the previous suit as it was held that that land was not included in *Khewat* No. 4 which was the subject matter of the mortgage. The plaintiff brought the present suit for possession on the basis of ownership. The suit was resisted by the defendants on the ground that the present suit was barred by the rule of *res-judicata*, that the defendants had been in possession of the land in dispute as owners since the time of their forefather *i. e.*, since S. 1951, that the defendants had effected improvements on the disputed land and incurred expenses to the extent of Rs. 700. The trial court dismissed the suit on the ground that it was barred by the rule of *res-judicata*. On appeal the District Judge came to the conclusion that the principle of *res-judicata* did not apply and that the suit was maintainable. The suit was remanded to the trial court for decision on other

issues struck in the case. The defendants have appealed against the order of remand.

The sole question for determination in this appeal is whether the present suit is barred by the rule of *res-judicata* or not. Counsel for the appellant has argued that Explanation (i) to section 11 of the Civil Procedure Code applies to this case, that the plaintiff ought to have included all the grounds of attack in his former suit and that having failed to do so it is not open to him now to bring a fresh suit in regard to the same property on the basis of title. It may be noted here that the previous suit which the plaintiff had brought was on the basis of mortgage and he claimed possession by redemption of land comprised of *Khewat* No. 3 and No. 4. In that suit it was held that *Khewat* No. 3 had not been mortgaged and so the plaintiff's suit in regard to *Khewat* No. 3, was dismissed. 9 *kanals* and 19 *marlas* of land which formed the subject matter of the present suit had by mistake been included in *Khewat* No. 3. The plaintiff did not and could not know about the mistake made by the revenue authorities in entering 9 *kanals* and 19 *marlas* of land in *Khewat* No. 3. He had filed the previous suit for recovery of possession on the basis of a mortgage in regard to both *Khewats* Nos. 3 and 4. He succeeded in getting possession of *Khewat* No. 4 by redemption but his suit in regard to *Khewat* No. 3 was dismissed. The question is whether the plaintiff should have included the prayer for possession of 9 *kanals* and 19 *marlas* of land on the basis of ownership in his previous suit. The plaintiff could not include this plea in the previous suit because at that time he was unaware of the mistake made by the revenue authorities in entering this land in *Khewat* No. 3. He realised this mistake only after the decision of the previous suit in which it was held that *Khewat* No. 3 was not mortgaged and the plaintiff could not claim possession on the basis of mortgage. It was after the decision in the previous suit that the plaintiff approached the revenue authorities and got the land which is the subject matter of this suit, included in *Khewat* No. 4. The plaintiff did not know certain facts when he brought the suit and therefore he could not raise a plea based on those facts in the plaint in the previous suit which he might have raised if he would have

been aware of those facts. It is a well established principle that a plea based on facts which did not exist at the time of the former suit but which came into existence subsequently cannot be said to be one which might have been raised in the former suit. As pointed out above it was not within the knowledge of the plaintiff that 9 *kanals* and 19 *marlas* of land had been wrongly entered by the revenue authorities in *Khewat* No. 3 instead of *Khewat* No. 4. He came to know about this fact after the suit was decided and he got the entry rectified by the revenue authorities. The present suit has been brought for possession of these 9 *kanals* and 19 *marlas* on the basis of ownership. In these circumstances the present suit is not barred by the principle of *res-judicata*. Moreover the plaintiff in his previous suit had claimed possession by redemption of the land which is in dispute in the present suit but the court in that suit held that the land was included in *Khewat* No. 3 which was free from mortgage and therefore the plaintiff could not claim possession by redemption. It directed the plaintiff to file a fresh suit for possession on the basis of ownership. In the previous suit the court did not decide the point whether the plaintiff was entitled to possession of this area on the ground that he was the owner of the land. In these circumstances also the present suit would not be barred because the court did not go into the question of ownership in the previous suit. There is no force in this appeal which is dismissed with costs.

Criminal Side Appellate Jurisdiction.

PRESENT :

The Hon'ble Masud Hasan Judge.

2001

APPEAL NO. 65 OF 2001.

Plagan, 5

GHULAM NABI AND ANOTHER.

Versus
STATE.

Ranbir Penal Code (Act XII of 1989)—Sections 302 and 307—Murder and attempt to murder—Difference explained.

It will be noticed that the main ingredients of the offence under section 307 which have to be definitely proved by the prosecution are that the act in dispute is done "with such intention or knowledge and under such circumstances that if he by that act caused death, he would be guilty of murder." The difference, therefore, between an offence under section 302 or section 307 is that in the former death is caused and in the latter death is not caused and the matter stops at an attempt to cause death.

APPEAL AGAINST THE ORDER OF SESSIONS JUDGE
JAMMU DATED 11TH *Magh* 2001.

MESSRS. HAMID ULLAH INDER DASS AND RAMNATH
LANGER—FOR THE APPELLANTS.

ASSISTANT ADVOCATE GENERAL—FOR THE STATE.

BY THE COURT.

Seven persons were put on their trial in the court of Subordinate Judge Magistrate 1st Class, under a number of sections, namely 307, 366/511, 448/452 and 148/149 R.P.C. This formidable array of sections was attributed to a story which is soon told.

It appears that on the evening of 2nd *Poh* 2000 at about 10-25 P.M. a report was made at the Police Station Jammu that some disturbance was taking place in the house of one Budha *Kanjar* in Urdu Bazar Jammu. Mian Said Ali Inspector of Police, who happened to be at the Police Station at that time repaired to the scene at once. It was alleged that a number of persons—all the accused who were put on their trial—had entered the house of this *Kanjar*. Ghulam Nabi is alleged to have entered into a room in which a daughter of Budha (*Mst.* Fazilat) was sitting on a *charpoy* and is alleged to have fired a shot from his pistol. Nobody was injured and the bullet mark was found subsequently in the wall at a height of 1½' below the ceiling. The party made good their escape before the arrival of the Inspector. Ghulam Nabi was arrested the next day and it was

not till late in the evening on the 3rd that the pistol was recovered from his room in the Metro Hotel in the City. It was in these circumstances that these seven persons were put upon their trial.

The trial court convicted Ghulam Nabi under section 307 and sentenced him to undergo three years' rigorous imprisonment and to pay a fine of Rs. 50. He was also convicted under sections 366/511, 452 and 148 R.P.C. and was sentenced to rigorous imprisonment for one year and to pay a fine of Rs. 5 on each count. The other accused persons were convicted under sections 366/511, 452 and 148 and sentenced each to undergo one year's rigorous imprisonment and also to pay a fine of Rs. 5 on each count. The sentences of imprisonment were ordered to run concurrently. In appeal the lower appellate Court maintained the conviction of Ghulam Nabi under section 307 and the sentence thereof but acquitted all the other accused persons excepting Shahab-ud-Din whose conviction under section 452 was altered to that under section 451 along with that of Ghulam Nabi and the sentences were reduced to three months' rigorous imprisonment and a fine of Rs. 5.

The prosecution story is sought to be supported by the evidence of Abdul Rashid the son of Budha *Kanjar*, *Mst.* Zamard his grand daughter and *Mst.* Bilo and *mst.* Fazilat his daughters. There is also produced the evidence of two other persons of the name of Ram Singh and Ram Lal who happened at that time in the house having come to hear music.

A small background is necessary to appreciate the main facts of this case. It appears that about 8 or 10 years before this occurrence *Mst.* Bilo, daughter of Budha *Kanjar*, was married to one Ghulam Rasul, the elder brother of the accused Ghulam Nabi in this case. Sometime prior to this occurrence this woman who had come to Jammu along with her husband contrived to escape from his custody and get back to her parents and took to her vocation as a dancing girl. This, the prosecution, story is, was a matter which caused umbrage to Ghulam Rasul and Ghulam Nabi. These two brothers

are stated before me to be belonging to a respectable family but have fallen on evil time and have taken to evil ways. The reason for the raid made by this party on the house of Budha is adumbrated by the prosecution to be an attempt to recover *Mst. Bilo*. It is, however, significant that the case or the prosecution itself is that Gulam Rasul was not there although it is not quite clear whether he was in Jammu or not.

The prosecution story, as has been found to be proved by the learned Sessions Judge, may be stated in his own words. In discussing the various events as they happened he remarked at the very out-set: "From the prosecution story as summarised above it appears that Ghulam Nabi had entered the house of Budha *Kanjar* on the night intervening 3rd *Poh* 2000. He fired a shot from his pistol he held is also proved." The Session Judge further goes on to say at another place "From the over-whelming evidence on the record it is clear that so far as the visit of Ghulam Nabi to the house of Budha *Kanjar* is concerned it is established beyond doubt that he did visit the house of Budha *Kanjar* and he held a pistol which he fired on going in." After the statement made by the accused Ghulam Nabi it appears to me rather pompous to call the fact of his visit to the house as a finding arrived on over-whelming evidence because it is not denied by Ghulam Nabi that he had gone to the house of Budha *Kanjar*. Ghulam Nabi says that he was in the habit of visiting this house off and on because *Mst. Bilo*, daughter of Budha *Kanjar* happened to be his sister-in-law. He goes on to say that sometime prior to that at the request of *Mst. Bilo*, he had given an exhibition of his prowess at pistol shooting by shooting at a mark in the room. His suggestion is that the bullet that was extracted was not fired on the 2nd but previously. Be that as it may, what has to be seen and what the learned Sessions Judge set himself to see in this case was; what offences were committed by this party. In discussing this matter the learned Sessions Judge came to the conclusion 'I have already dealt with at length that there is no proof as to any preparation having been made by the accused persons in respect of causing hurt or assault or wrong-

ful restraint." Having come to this conclusion the learned Sessions Judge acquitted five out of seven accused persons and in the case of shahab-ud-Din as also in the case of Ghulam Nabi altered the conviction from section 452 to 451 on this consideration. If there was no proof as to any preparation having been made by the accused person in respect of causing hurt or assault or wrongful restraint then it is obvious that the fact of firing the pistol remains only a spasmodic act without pre-meditation or intention. But leaving this aspect of the matter for the nonce there is no evidence whatever in this case which would invest Ghulam Nabi with the intention of committing an offence under section 307 of which he has been convicted. It will be noticed that the main ingredients of the offence under section 307 which have to be definitely proved by the prosecution are that the act in dispute is done "with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder." The difference therefore between an offence under section 302 and 307 is that in the former death is caused and in the latter death is not caused and the matter stops at an attempt to cause death. There is in the evidence of the prosecution not even a suggestion that Ghulam Nabi came with the intention of killing anybody. The nearest that one could get, as has been very rightly pointed out by the learned Assistant Advocate General, is in the statement of *Mst. Fazilat* who was present in the room and felt some apprehension of being hit by the pistol shot that was fired by Ghulam Nabi. Her statement is that she was sitting on a *charpoy* in a room and Ghulam Nabi was shouting for *Mst. Bilo* when he entered and he again shouted for *Mst. Bilo* and then fired a shot from his pistol. She added that she dodged down otherwise the shot would have hit her. This will appear to be a mere colouring and is certainly not credible. The plan of the room in which all this happened was made by the investigating officer but from his examination and from the plan many of the important things, *i.e.*, the height of the room and its size, were left unexplored. I, therefore, thought it proper to send down a Sub-Inspector of Police to the spot to make a fresh plan and take measurements. This plan is now before

me and it would appear that this room is no more than 14' in length and 10' in breadth. Its total height is 8½' and the height of the bullet mark from the floor is 7' i.e., the mark is only at a distance of 1½' below the ceiling. If any inference has to be drawn from the fact of the location of the bullet mark, it is obvious that in a room of such small dimensions the fact that the mark is only 1½' below the ceiling would only go to show that the intention of the person who fired could not be to kill anybody but only to cause a scare. Besides, it appears that when the pistol was recovered from the possession of the accused as many as 15 cartridges were found with it and if Ghulam Nabi had gone there with so many persons and pistol and so much ammunition he would not have missed his target that evening. Looked at from whatever point of view, therefore, the ingredients of an offence under section 307 do not appear in my estimation to have been proved.

Nor does the meagre prosecution evidence which has been led in this case carry conviction. As has been stated above the prosecution evidence consists only of six witnesses. Four of these consist of Budha's son and daughters. Of these the evidence of two persons has been discarded by the learned Sessions Judge, i.e., Abdul Rashid and Mst. Bilo, I shall have to revert to the statement of Abdul Rashid at some length. It is not possible to place any reliance upon his evidence. He keeps a tailoring shop which is located just in front of his house in Urdu Bazaar. It is well known that Urdu Bazaar is a very densely populated locality and at this time of the evening attracts many idling vagabonds because of the houses of these *Kanjars*. There is no dearth of people loitering about. Abdul Rashid's story, as given in the first information report, is that he went to his house on hearing the sound of a pistol shot. In his statement before the court he said that he was attracted to the scene by the noise of the people going into his house and that Ghulam Nabi fired a pistol. This portion may be stated in his own words:-

aur jab khirki ke nazdik pahuncha to Ghulam Nabi mulzim ne Pastani ka fair kar diya.

S. N. DARR, J. A. L. C.
Vakil High Court
SRINAGAR

The only interpretation that can be placed on these words that he wanted it to be believed that the pistol was fired in his presence. It is not possible to expect that Abdul Rashid would have heard the sound of the pistol shot from his shop. If that were so, many other people would have done so and the prosecution would not be reduced to the necessity of producing only the inmates of the house to prove this occurrence. Then it appears that all these witnesses have their knife in Ghulam Rasul, the brother of Ghulam Nabi. Abdul Rashid in his statement in the first information report says about Ghulam Rasul "*jo ajkal Jammu hai*" in describing the antecedents of the story between Ghulam Rasul and Mst. Bilo whereas in his statement before the Court he said :---

Ghulam Rasul bhe motor main se utra tha aur yeh tmam hamare mukan main dakhil huye the mujhe achhi tarah yad hai ke Ghulam Rasul ne he mulzman ko kaha tha ke pakr lo aur maro. Ghulam Rasool ka nam policc main lakhaya tha aur yeh bhi zahir kiya tha ke us ne mulzman digar ko kaha tha ke pakr lo.

It is obvious that all this is an unabashed surplusage. There is no doubt that this witness is wilfully giving perjured evidence. His evidence has rightly not been believed by the lower court and I have no hesitation in discarding it. There then remains the evidence of Mst. Zamard. Her evidence is also tinted with more or less the same defects. In a round manner she corroborates the statement made by the accused Ghulam Nabi that he used to go to her place on previous occasions also with a pistol. Mst. Bilo's statement also has been discarded by the courts below and I need not revert to it because apart from the fact that she is anxious not to have to go back to her husband Ghulam Rasul she contributes nothing needful to the prosecution case. Mst. Fazilat's evidence has been discussed above. The story unfolded by her falls short of attracting an offence under section 307 against Ghulam Nabi.

Mention may be made here of the statement of Ram Singh and Ram Lal, the witnesses who are entirely independent and would have carried great weight had it not been for the fact that the prosecu-

tion thought it fit to have them declared as hostile. They say that they had gone to this house that evening for the purpose of hearing music and that Ghulam Nabi also came there for the same purpose and intended to appropriate the singer to himself. As they had been there before him they wanted that they should be served first. On Ghulam Nabi's quarelling about the matter they left the house and found that Ghulam Nabi also did the same. Assuming that this is belittling the whole occurrence the fact remains that as far as the question of so many people coming with an intention of committing an offence is concerned, the suggestion is clearly negatived by the evidence of these witnesses.

I have not thought it necessary to revert to that part of the evidence of the prosecution witnesses which relates to the case of those who have been acquitted. I might only say a few words about the offence under section 451. Conviction in the first instance had been recorded under section 452. The lower court converted it into one under section 451. As far as the question of trespass, in the abstract, is concerned I am loath to believe that visit in the evening to the house of a prostitute could be said to be trespass. In any case because of the fact admitted in this case that Ghulam Nabi was in the habit of visiting the house because Mst. Bilo was his sister-in-law there is no point in maintaining conviction under this count.

The result, therefore, is that conviction of Ghulam Nabi under section 307 and 451 R.P.C. is quashed. The conviction of Shahab-ud-Din under section 451 is also quashed. They shall be set at liberty forthwith if not wanted in connection with some other case. The fine, if paid, shall be refunded.

I cannot leave the matter here. As has been remarked by me in the course of discussing the evidence of Abdul Rashid there is no doubt that he has been deliberately giving perjured evidence. His statements with regard to the firing of the pistol and the presence of Ghulam Rasul particularly do not admit of any explanation. I would, therefore, direct that a notice under section 476 Cr. P. C., be issued against

Abdul Rashid to show cause why he should not be dealt with perjury.

Appellate Civil.

*Before Mr. Justice Janki Nath Wazir (Officiating
Chief Justice).*

and

Mr. Justice Masud Hasan.

2001

Phagan, 16

NIAZ ALI—(PLAINTIFF)—APPELLANT.

Versus

FAIZU AND OTHERS—(DEFENDANTS)—RESPONDENTS.

CIVIL 2ND APPEAL NO. 387 OF 2001.

Tenancy Act (II of 1980)—Section 67(4)—Alienation of occupancy rights by widow prohibited—Alienation by widow can be challenged by collaterals—Section 66 not applicable—Alienation by widow void and not voidable.

There can be no manner of doubt that the language used in section 67 (4) is mandatory and the prohibition with respect to the power of widow to alienate occupancy rights is absolute. There is therefore no question of the alienation by widow being voidable at the instance of any body. The transaction must be held to be void ab initio.

*39 P. L. R. J. & K. Rulings 65 and 40 P. L.R. J. & K. Rulings 44 dissented.
A. I. R. 1930 Lahore 942 not approved;
A. I. R. 1940 Lahore 364 approved.*

APPEAL FROM THE DECISION OF THE DISTRICT JUDGE MIRPUR (PANDIT BISHAMBER NATH KAUL) DATED 11TH *Katik* 2001.

MR. SURAJ PRAKASH—For the Appellant.
MR. AHMED YAR.—For the Respondents.

Per Masud Hasan J.—This appeal and the cross-objection arise out of a suit for declaration by the

plaintiff styling himself as the collateral of one Fateh Mohammad who was an occupancy tenant of certain agricultural holdings. Fateh Mohammad, the occupancy tenant, died leaving behind him his widow *Mst. Almon* who is defendant No. 1 in this case and Faizu defendant No. 2. Faizu is Fateh Mohammad's brother. He has no male issues and has two daughters. The occupancy holding was joint in the name of *Mst. Almon* and Faizu after the death of Fateh Mohammad. *Mst. Almon* and Faizu executed a deed of gift of the agricultural holding in favour of the daughters of Faizu and this transaction was challenged by Niaz Ali on two grounds. It was challenged in the first instance on the ground of certain custom that *Mst. Almon* being a widow could not alienate any property by gift. It was said in this behalf, secondly, that such gift by *Mst. Almon* would also be void in view of the provisions of the Tenancy Act. With regard to Faizu it was said that he was a son-less proprietor and therefore, according to custom, any alienation made by him was void. A declaration on these points was sought. The lower Court held that the customs alleged by the plaintiff were not proved. It held that the alienation by *Mst. Almon* was invalid on the ground that there must be presumed a general custom prevailing among the agricultural tribes restricting the rights of alienation by a widow of agricultural holdings. In the case of Faizu it was held that there was no custom and that the alienation by him of his share must be considered to be valid. Niaz Ali, the plaintiff, appealed against this decision but did not make *Mst. Almon* a party to this appeal. *Mst. Almon*, however, put in cross-objections within the statutory period and an application was made by the plaintiff to implead her as a party. This application was granted and the cross-objections were admitted.

It was contended before us on behalf of *Mst. Almon* that an alienation by a widow could not be challenged by the collaterals. The alienation was challenged before us not on the ground of custom, which has been found not to have been proved by the Courts below, but on the ground of the provisions of section 67 sub-section 4 of the Tenancy Act. That

sub-section is as follows :—

“(4) When a widow succeeds to a right of occupancy and such right is not held directly from the state as landlord in the Jammu Province she shall not transfer the right by sale, gift or mortgage, or by sub-lease for a term exceeding two years.”

It is contended that there is a definite statutory prohibition against alienation by a widow. The argument is met on the other side by placing reliance upon section 66 of the same Act which lays down :—

“ 66. Transfers of occupancy right not made in accordance with the provisions of this Act shall be voidable on suit instituted within six years of the date of the transfer at the instance of the landlord or, in the cases mentioned in sub-section (1) of section 60, at the instance of either the landlord or of the occupancy tenant of grade A.”

It is argued that an alienation by a widow cannot be said to be anything than an irregular transfer and is therefore voidable and not void *ab initio*. It is contended that it is only the landlord and in certain cases occupancy tenant of grade A that can challenge these alienations and that the colletarals have no right to do so. Reliance in this behalf is placed on two rulings of this court reported as *Ghougatta versus Gulab Singh and others*, 39 P.L.R. J. & K., 65 and *Nand Singh versus Mst. Achhri and others* 40 P. L. R., J. & K. 44. The gist of these rulings is that the provisions contained in section 67 of the Tenancy Act are for the benefit of the landlords and that section or any other section in the Tenancy Act does not contemplate any right in favour of persons other than landlords or occupancy tenants. We have gone through these two rulings and we find that they are based upon a ruling of the Lahore High Court contained in *Mst. Thando versus Hashim Ali* and another, A. I. R. 1930 Lahore 1942. This was a Single Judge case. On the basis of some earlier rulings of the Lahore High Court it was held by his

Lordship . that ' the collaterals had no right to control the alienations by the widow, no such right being given to them by the Tenancy Act. The right of course existed under Customary Law if the reversioners had the power to control the widow's alienation of ordinary land under that law.' This view we might say with great respect, does not commend itself to us. This single Judge ruling of the Lahore High Court was later on over-ruled by a Full Bench of that court in the year 1940 in *Labbh Singh versus Hassan and others*, A.I.R. 1940 Lahore 364. His Lordship Mr. Justice Bhide in the course of his judgment was pleased to remark " Sections 53 to 58 are included in the Act under the heading, ' alienation ', while Section 59 comes under a different heading viz., ' succession '. " (In the State Act section 67 is equivalent to section 59 of the Panjab Tenancy Act). " The latter section introduces some important changes in the personal law of occupancy tenants in matters of succession, which affect his heirs and reversioners. For example, according to Section 59 a widow succeeds to a life estate in the entire occupancy holding of her husband until death or re-marriage ; but she could not have so succeeded under personal law, if he were, e.g., a member of a joint Hindu family, or even if he were governed by Mohammadan Law. His Lordship again was pleased to remark." I am unable to see how the language of Section 60 can be said to be conclusive on the question whether a transfer by a widow falling within the scope of Section 59 (3) is void or voidable. Section 60 merely says ' any transfer made in contravention of the preceding sections shall be voidable at the instance of the landlord.' In other words, it only gives the right to the landlord to intervene, and avoid transactions which are effected in contravention of the preceding sections. The question whether a transaction falling within the purview of sub-section 3 of Section 59 is void or voidable must, I think be decided on the language used in that sub-section. We have quoted that sub-section in extenso. In our opinion there can be no manner of doubt that the language there used is mandatory and the prohibition absolute. There is, therefore, no question of the alienation being voidable at the instance of anybody.

The transaction must be held to be void *ab initio*. It is obvious on a perusal of the rulings of this Court quoted above that the confusion arose because of the intermingling of the provisions of Section 66 which govern cases of alienation with that of the matters of succession in which the prohibition is included. In this view we are of the opinion that the alienation by way of gift by *Mst. Almon* in this case would be void *ab initio* and the collettarsls have a right, being entitled to succeed afterwards, to challenge it, and claim a declaration. In this view the plaintiff is entitled to the declaration claimed to the extent of *Mst. Almon's* share and the suit relating to the share of *Faizu* fails.

In the result both the appeal and the cross-objections are dismissed with costs.

Revisional Civil.

Before Mr. Justice Masud Hasan.

MR. ARJAN NATH GANJOO—(PLAINTIFF)—
APPLICANT.

Versus

2002 PT. KASHI NATH RAZDAN—(DEFENDANT)—OP-
POSITE PARTY.

Jeth, 30

CIVIL REVISION No. 190 OF 2001 (A.R.A.)

Civil Procedure Code (Act X of 1977)—Order XXIII rule 3—Compromise—Suit based on an adjustment amounting to the undertaking of a liability—Suit maintainable.

Apparently there is no law in which any adjustment amounting to the undertaking of a liability with a view to discharge it should not be the subject matter of another suit. The fact of the parties having arrived at a compromise in the course of a pending suit would not defeat the suit brought on the basis of the liability undertaken.

A promise deliberately made in compromise of threatened legal proceedings upon a claim honestly put forward is enforceable.

REVISION FROM THE DECISION OF THE FIRST
ADDITIONAL MUNSIFF SRINAGAR, (MR. N. K. KAK),
DATED 30TH Katik 2001.

MR. MOHAN KISHAN TIKU—For the Applicant.
MR. TARA CHAND—For the Opposite-Party.

This is the plaintiff's application in civil revision arising out of a suit tried under the Agriculturists' Relief Act. The suit was for the realisation of a sum of Rs. 165-8-0 on the basis of a compromise dated 5th Poh 1996. By means of this compromise the defendant admitted to discharge the liability in accordance with a scheme incorporated in that compromise. The suit was contested by the defendant on a number of pleas, the main plea being that the compromise was arrived at in the course of a suit filed by the plaintiff in the Court of Small Causes and that it had merged into a decree passed by that Court. The decree was a nullity in as much as the defendant was an agriculturist, a fact admitted in the compromise, and therefore the compromise upon which the decree was based was also a nullity. Yet a second plea was taken that the compromise was arrived at without entering into accounts. On the question of accounts the trial court recorded a finding in favour of the plaintiff and held that the compromise was arrived at after understanding the accounts. On the first point the court held that the suit was not maintainable as the compromise was arrived at in the course of a pending suit followed by a decree which was a nullity.

It is true that if one of the parties to the suit—the defendant in this case—was an agriculturist the Court of Small Causes would be found to have no jurisdiction in the matter and in that view the decree passed by it must be considered to be a nullity. It appears that the plaintiff in the first instance made an application for the execution of the decree passed upon the compromise and that application was dismissed on the ground that the decree was no

executable being a nullity. It was thereafter that he filed this suit on the basis of the compromise. In my opinion the question of the nullity of decree was separable and should have been separated from the matter of the compromise arrived at between the parties. In this suit it was not the decree that was of any significance or was sought to be enforced. What the plaintiff wanted was to enforce the compromise under which the defendant had undertaken to discharge the liability. There is no doubt that that liability was undertaken in the course of a pending suit. I entirely agree with the contention advanced on behalf of the opposite party that the compromise was an adjustment of the suit then pending in terms of Order 23, Rule 3, Civil Procedure Code. But I have not been shown any law in which an adjustment amounting to the undertaking of a liability with a view to discharge it should not be subject-matter of another suit. To my mind the question of the parties having arrived at a compromise in the course of a pending suit does not present any such difference as would defeat the suit brought on the basis of the liability undertaken. It would have been another matter if an attempt were made to show that the liability was not undertaken out of free will but under fraud, mis-representation, coercion or similar other circumstances. Care in this behalf will have to be taken to distinguish between coercion and fraud practised upon the party undertaking the liability and fraud by that party itself. It has been pointed out to me in this case that the plea taken on behalf of the defence was that the compromise was arrived at in order to avoid the passing of a decree against the defendant by the Court of Small Causes. That would not amount to coercion or fraud practised upon the defendant; it is the fraud of the defendant practised upon the plaintiff in this case. It would show that although the defendant had solemnly undertaken the liability he had not the slightest intention of discharging it. To countenance such a plea would be placing premium upon frauds. The simple matter is to see whether the liability was duly undertaken leading the other side to believe that it will be discharged. In this behalf the finding arrived at by the trial court must be considered as sufficient because that finding repeals the plea taken

by the defendant and avers that the liability was willingly undertaken and that the evidence of the defendant to prove the contrary is not reliable.

The question is whether there was good consideration for the compromise and whether it was enforceable in law. In *Jayawickreme and another versus Amarasuriya*, Law Reports, Appeal cases 1918, 869 it was held that "A promise deliberately made in compromise of threatened legal proceedings upon a claim honestly put forward is enforceable..... In that case a woman and her husband had sued the former's brother for a certain sum of money on the basis of a compromise. The compromise was arrived at between the parties when the plaintiff had threatened to sue the defendant for a certain claim made with regard to the assets of the father in the hands of the defendant. The plea taken by the defendant in that case was that he was induced to compromise because of threatened legal proceedings and that the claim of the plaintiff was not valid. It was remarked by their Lordships of the Privy Council that "The legal validity or invalidity of the claim the female plaintiff threatened to enforce by action is entirely beside the point if she, however mistakenly *bona fide* believed in its validity." Reliance may also be placed in this behalf on the rationale of the case decided in *Raja Jagat Kishore Acharya Choudhuri versus Hemendra Kishore Acharya Choudhuri and others*. 39 Calcutta Weekly Notes, 123. In this view the finding that the suit is not maintainable cannot be upheld.

If the matter had not been under the Agriculturists' Relief Act there would have been no difficulty in disposing of it completely in view of the principles laid down in the rulings mentioned above. The provisions of the Agriculturists' Relief Act are a departure from the general law and under that Act irrespective of the sanctity of the contracts otherwise it has to be seen whether the claim made by the plaintiff is based upon an understanding of the accounts between the parties. Under this Act it was necessary even in a case which purports to close previous dealings by means of the compromise to rip open the transaction between the parties in terms

of section 8 of the Agriculturists' Relief Act and "enquire into the history and merits of the case from the commencement of the transaction between the parties and the person (if any) through whom they claim out of which the suit has arisen..... with a view to taking an account between such parties in manner hereinafter provided."

The finding of the Court in favour of the applicant that the compromise had been arrived without duress and willingly would not amount to a finding under the Agriculturists' Relief Act that the sum admitted to be paid represents the exact sum due. This would require a finding as to what is due to the plaintiff in this case on an account taking in accordance with the provisions of the Agriculturists' Relief Act. The judgment and decree of the lower Court are, therefore, set aside and the suit is remanded to be disposed of in accordance with law in the light of the remarks made above. Costs shall abide the result.

Revisional Civil.

Before the Chief Justice (R. B. Ganga Nath).

2002

Jeth, 3

NANDE LAL KOUL (AUCTION PURCHASER)—APPLICANT.
Versus

Mst. JANA BIBI AND ANOTHER—(JUDGMENT-DEBTORS).

PT. PRAKASH RAM AND ANOTHER—(DECREE-HOLDERS) OPPOSITE PARTY.

Civil Procedure Code (Act X of 1977)—Order XXI, rules 90, 91 and 92—Application to set aside sale on account of fraud and want of notice—Period of limitation for such an application—Limitation Act (IX of 1995)—Article 166.

The time of limitation for such application is only 30 days from the date of sale under Article 166 of the Limitation Act. Whether the application for the setting aside of the sale is based on any irregularity or

fraud, it makes no difference because the application would fall under order XXI rule 90 and Article 166 of the Limitation Act would apply to all the applications no matter on what ground they are based so long as they are under the Civil Procedure Code to set aside a sale in execution of a decree.

REVISION FROM THE ORDER OF THE SENIOR SUB-JUDGE SRINAGAR, (MUNNA LAL SHARMA)—DATED 10TH *Maghar* 2001.

MR. SARWA NAND—For the Applicant.

MR. JIA LAL KILAM—For the non-applicants.

This is an application in revision against the order of the lower Court remanding the case to the execution Court for further enquiry. The application has been made by the auction purchaser. The opposite party made an application under Order 21 rule 90 C.P.C. to set aside the sale on the ground of fraud and want of notice. The execution Court held that the application was time-barred and dismissed it. The lower Court has allowed the application on the ground that the period of limitation would run from the date of knowledge of the fraud. The lower Court has not referred to any article of the Limitation Act or any rule of law under which he has given his decision. It shows utter ignorance of law. If the lower Court had taken the trouble of reading rules 90, 91, and 92 of Order 21 of the Civil Procedure Code and Article 166 of the Limitation Act such a blunder would not have been committed.

The sale in this case took place on 16th *Sawan* 1998. It was confirmed on 16th *Magh* 2000. The present application was made on 29th *Assuj* 2001 i.e., long after 30 days after the sale. After a sale has been confirmed no application under Order 21 rule 90 would lie. The confirmation of sale follows the decision of an application under order 21 rule 90. As already stated the time of limitation for such application is only 30 days from the date of sale. Whether the application for the setting aside of the sale is based on any irregularity or fraud, it makes no difference because the application would fall under

order 21 rule 90 and article 166 of the Limitation Act would apply to all the applications no matter on what grounds they are based, so long as they are under the Civil Procedure Code to set aside a sale in execution of a decree. The order of the lower Court cannot be supported. It is, therefore, ordered that the application be allowed with costs, the order of the lower Court be set aside and the application of the opposite party be dismissed with costs.

Appellate Civil.

*Before the Chief Justice (R. B. Ganga Nath)
and
Mr. Justice Masud Hasan.*

Mst. ZEBI—(PLAINTIFF)—APPELLANT.
Versus

RESHA MIR AND OTHERS—(DEFENDANTS)—RESPONDENTS.

CIVIL 2ND APPEAL NO. 243 OF 2001.

Customary Law—Succession—Right to fall back upon personal law.

Succession could be governed either by a custom or by personal law because there cannot be two different and inconsistent rules of succession and inheritance.

It appears that some confusion exists as to whether a person who sets up a custom relating to succession can inherit under the Mohammadan law. It is only when a custom is set up by a plaintiff which is not admitted by defendants and the plaintiff fails to prove the existence of the custom that the plaintiff would be entitled to

succeed under the Mohammadan Law. In the absence of any custom governing succession it is the personal law which would apply.

APPEAL FROM THE DECISION OF THE SENIOR
SUB-JUDGE SRINAGAR (PANDIT MUNNA LAL SHARMA)
DATED 23RD Sawan 2001.

MR. A. N. KAK—For the Appellant.

MR. SATYA PAL—For the Respondent.

Per C. J.—This is second appeal by plaintiff arising out of a suit brought by her for possession of the property described in the plaint. The plaintiff's case was that the property in dispute belonged to her father, that succession was governed by a custom under which a *khana nashin* daughter got the entire property of her father and that she was a *khana nashin* daughter. The defendants admitted the custom but contended that the plaintiff was not a *khana nashin* daughter. The trial court found that the plaintiff was a *khana nashin* daughter and decreed the suit. On appeal the lower Court has found that the succession is governed by custom and that the plaintiff is not a *khana nashin* daughter. On these findings the lower Court has dismissed the plaintiff's suit.

It was contended on behalf of the appellant that she was a *khana nashin* daughter. It is not denied that the appellant was married by her mother after the death of her father. It has been held in several cases that it is the right of the father alone to appoint a *khana nashin* daughter. He can do so because he is the owner of the property and he can appoint his successor. The rule about *Khana Nashin* daughter as given in Santram Dogra's Customary Law is as follows :—

“ Daughters inherit only when they reside with their husband in their father's home, and are

made *Dukhtari-Khana Nashin*, otherwise not."

This rule by itself shows that the daughter can be made *khana nashin* only when she resides with her husband in her father's home. It implies that she would be *khana nashin* only when she and her husband live with her father in his home. The mother, as has been rightly observed by the lower Court has only a limited interest and therefore she cannot confer any rights higher than those of her own on any person. We agree with the finding of the lower Court that the plaintiff is not a *khana nashin* daughter.

It was further contended on behalf of the appellant that even if she were not a *khana nashin* daughter she would be entitled to a share under the Mohammadan Law. It was common case of the parties that succession was governed by custom under which a *khana nashin* daughter succeeded to the entire property. Succession could be governed either by a custom or by personal law because there cannot be two different and inconsistent rules of succession or inheritance. It was admitted by the parties that a *khana nashin* daughter would succeed to the entire property. The plaintiff is not a *khana nashin* daughter and according to the custom stated above she would not inherit the property at all.

It appears that some confusion exists as to whether a person who sets up a custom relating to succession can inherit under the Mohammadan Law. It is only when a custom is set up by a plaintiff which is not admitted by defendant and the plaintiff fails to prove the existence of the custom that the plaintiff would be entitled to succeed under the Mohammadan Law because no custom governing succession has been admitted or established by the parties, and in the absence of any custom governing succession it is the personal law which would apply.

There is no force in the appeal. It is dismissed with costs.

Appellate Civil.

Before the Chief Justice (R. B. Ganga Nath)
and
Mr. Justice Masud Hasan.

RASOOL LONE AND OTHERS—(DEFENDANTS)—
APPELLANTS.

Versus

Mst. REHMATI AND ANOTHER—(PLAINTIFFS)—
Mst. KHURSHI AND ANOTHER—(DEFENDANTS)—
RESPONDANTS.

2002

Jeth, 10

CIVIL 2ND APPEAL NO. 252 OF 2001.

(1) Custom—Kashmir Valley—Khana Nashin daughters only inherit.—Distinction between the pleading of custom and the pleading of the status of Khana Nashin daughter explained.

Care must be taken to distinguish between the pleading of custom and the pleading of the status of Khana Nashin daughter to be able to claim under that custom. The custom generally prevalent among the agriculturists in the Kashmir Valley is that daughters inherit only if they are Khana Nashin daughters, otherwise they do not inherit at all. The question that a certain custom prevails among the parties must be ascertained first and it is after such a custom is proved that the custom of inheritance of daughters as Khana Nashin daughters would arise.

(2) Custom—daughter claiming inheritance as Khana Nashin daughter cannot claim that under Mohammadan Law—Inconsistent plea.

Pleadings on behalf of the plaintiffs will be inconsistent if they claim as Khana Nashin daughters

and also plead that if they are not proved to be *Khana Nashin* they must be given a share under the Mohammdan Law. In the event of the custom prevailing there is no question of the plaintiffs succeeding to any share under the Mohammdan Law in the absence of proof that they are *Khana Nashin* daughters.

APPEAL FROM THE DECISION OF THE DISTRICT JUDGE SRINAGAR (L. BARKAT RAI) DATED 20TH Bhadon 2001.

MR. A. N. KAK ADVOCATE—For the Appellants.

MR. SARWA NAND KAUL—For the Respondents.

Per Masud Hasan J.—This is the defendants' appeal arising out of a suit for possession. The plaintiffs are *Mst. Rehmati* and *Mst. Jani* two of the four daughters left by one *Akli Lone* who had also a son named *Rajab*. The plaintiffs' case was that they were *Khana Nashin* daughters of *Akli Lone* and were entitled to inherit a share equal to that of their brother *Rajab* and that after the death of *Rajab* the entire property fell to their share. They originally only prayed for a declaration but on an objection by the defendant that a suit for mere declaration without the addition of consequential relief was not maintainable the plaint was amended and a prayer for possession was inserted in it. The defendants pleaded that the plaintiffs were not *Khana Nashin* daughters and were not in possession of the property. The custom, however, that *Khana Nashin* daughters do inherit was admitted by the parties. It may be stated here that the plaintiffs said that in case they were not proved to be the *Khana Nashin* daughters a share according to Mohammdan Law should be given to them. This plea it would appear was inconsistent with the general pleadings made by them with regard to custom.

The court of 1st instance held that the suit was maintainable and that the plaintiffs were not *Khana Nashin* daughters but it gave them a decree for 1/12th share of the entire *Khetwet* and for permanent injunction against the defendants restraining them from interfering with the possession of the plaintiffs. This decree was passed in accordance with Moham.

madan Law. In appeal before the lower appellate Court the same position was maintained. The lower appellate Court remarked. "The plaintiffs are not entitled to get the inheritance of Akli Lone as *Dukhtar Khana Nashin*, but they cannot be deprived of their right under the Mohammadan Law. The parties being Mohammadans the presumption is that they are governed by Mohammadan Law, unless and until some custom is alleged by any party and it is proved by it." This proposition is not sound. Care must be taken to distinguish between the pleading of custom and the pleading of the status of *Khana Nashin* daughter to be able to claim under that custom. The custom generally prevalent among the agriculturists in the Kashmir Valley according to Sant Ram Dogra's Tribal Customs' is that daughters inherit only if they are *Khana Nashin* daughters. Otherwise they do not inherit at all. The question that a certain custom prevails among the parties must be ascertained first and it is after such a custom is proved that the question of inheritance of daughters as *Khana Nashin* daughters would arise.

In this case the pleadings on behalf of the plaintiffs are inconsistent. They claim as *Khana Nashin* daughters and also plead that if they are not proved to be *khana Nashin* they must be given a share under the Mohammadan Law. By pleading that they were *Khana Nashin* daughters they must be presumed to admit that a custom with regard to *Khana Nashin* daughters inheriting property prevails in the family. If such a custom prevails then there is no question of their getting anything if they are not proved to be *Khana Nashin* daughters. The defendant also admitted by implication that the custom stated above obtains among the parties but contended that the plaintiffs were not *Khana Nashin* daughters. There is a unanimous finding of both the courts below that the plaintiffs are not *Khana Nashin* daughters and therefore they cannot claim any inheritance under that custom. In the event of the custom prevailing there is no question of the plaintiffs' succeeding to any share under the Mohammadan Law in the absence of proof that they are *Khana Nashin* daughters. In this view the decree for a share calculated in accord

ance with the principles of Mohammadan Law passed in favour of the plaintiffs is erroneous. We shall therefore, set aside the judgments and decrees of the Courts below and dismiss the plaintiffs' suit in its entirety. This appeal is allowed with costs.

Appellate Civil

*Before the Chief Justice (Rai Bahadur Ganga Nath)
and
Mr. Justice Janki Nath Wazir.*

TARA CHAND—(DEFENDANT)—APPELLANT.
Versus

2002
————— KANWAR UPENDAR KISHEN KOUL AND OTHERS—
Sawan 16 —(PLAINTIFFS)—RESPONDENTS.

CIVIL IST APPEAL NO. 17 OF 2002.

Limitation Act (IX of 1905)—Section 14—Under valuation of suit under a bonafide impression—Benefit allowed.

Where the Mukhtar of the plaintiff filed an affidavit in the Court of first instance stating that as the land under dispute was assessed to land revenue, the plaintiff was under a bonafide impression that the value should be fixed at 50 times the land revenue under the rules for the valuation of suits, the plaintiff acted throughout bonafide and in good faith and was entitled to the benefit of section 14 of the Limitation Act.

APPEAL FROM THE DECISION OF CITY JUDGE
(LALA ANANT RAM GUPTA) SRINAGAR, DATED 29TH
Baisakh 2002.

MR. A. N. KAK ADVCCATE—For the Appellant.
MR. SUNDAR LAL ADVOCATE.—For the Respondents.

Per C. J.—This is an appeal by defendant arising out of a suit brought by the plaintiff respondents against him and the other defendant respon-

dents. to pre-empt the property sold by defendants Nos. 2 to 8 to defendant appellant. The plaintiff's case was that he was an owner of a *khewat* in the same *Mahal* in which the property sold was while the defendant vendee was a stranger and therefore he had a prior right of purchase. He also contended that Rs. 4,500, the sale price entered in the sale deed was not the real sale price. The defendant appellant contended that the price entered in the sale deed (Rs. 4,500) was the real sale price, that the plaintiff had no right of prior purchase, that he had waived his right by having refused to purchase the property, that he was entitled to Rs. 1,500 as compensation for the improvements made by him in the land in dispute and that the suit was barred by limitation. The trial Court awarded only Rs. 500 for compensation for the improvements and finding all other points against the vendee decreed the suit. The plaintiff has filed a cross-objection with regard to the compensation awarded to the defendant.

The first point to be determined is whether the suit was barred by limitation. The sale was made by a registered deed on 6th *Har* 1997. The suit was filed in the court of the City Munsiff on 1st *Poh* and value of the suit for the purposes of jurisdiction was fixed at 50 times the land revenue which came to Rs. 454-11-0. On this valuation the suit was filed in the Court of the City Munsiff. The defendant contended that the value for jurisdiction should have been fixed accoring to the market value of the property and that the suit was not cognizable by the Court of the City Munsiff. On 29th *Baisakh* 1999 it was decided by the Court that the value should have been Rs. 4,500 and that the suit was not cognizable by it. The plaint was returned by it for presentation to the proper Court. It was presented in the Court of the City Judge on the same day i.e., 29th *Baisakh* 1999 on which it was returned by the City Munsiff. The lower Court has given to the plaintiff the benefit of section 14 of the Limitation Act and excluded the time during which the suit remained pending in the Court of the City Munsiff. It was contended by learned counsel for the appellant that the plaintiff should not have been given the benefit of section 14 of the limitation Act in as much as the plaintiff did

not act with due diligence and in good faith. Section 14 of the Limitation Act lays down :--

"In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with the due diligence another civil proceeding, whether in a Court of first instance or in a court of appeal, against the defendant shall be excluded, where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a court, which from defect of jurisdiction, or other cause of a like nature, is unable to entertain it."

The point to be considered in this case is whether the plaintiff prosecuted his suit in good faith in the Court of the City Munsiff which for want of jurisdiction was unable to entertain it. There was no suggestion on the part of the plaintiff that there was any ulterior motive in filing the suit in the court of the City Munsiff nor was there any suggestion that there was any intentional under-valuation of the suit. What has been contended by him is that the plaintiff did not take due care in filing the suit in the Court of the City Munsiff. The lower Court has found that the plaintiff acted throughout *bona-fide*. As already stated, there is no suggestion on the part of the appellant that there was any intentional under-valuation of the suit or the plaintiff had any ulterior motive in filing the suit, in the Court of the City Munsiff. In *Mohindra Nath Bagchi versus Tarak Chandra Sinha and others* A.I.R. 1932 Calcutta 504, it was held :—

"Where the plaintiffs act throughout *bona-fide* and do not intentionally undervalue their suit they are entitled to a deduction of time spent in arriving at a correct valuation of their suit."

An affidavit was filed by the *Mukhtar* of the plaintiff in the court of the City Judge to explain as to how the mistake was committed. He said in the affidavit that as land was assessed to land revenue the plaintiff was under a *bona-fide* impression

that the value should be fixed at 50 times the land revenue under the rules for the valuation of the suits framed by this court. This explains as to how the mistake was committed. The point was not very clear because in *Ayling and Kullappa Goundan versus Abdur Rahim Sahib*, A.I.R. 1918 Madras 805 *and Audathadan Moidin and others versus Mamally and another*, I.L.R. 12 Madras 301 the Madras High Court took the same view. In these circumstances we agree with the finding of the lower Court that the plaintiff acted throughout *bona-fide* and in good faith and was entitled to the benefit of section 14 of the Limitation Act.

The next point urged by the appellant was that Rs. 500 awarded to him for compensation for improvements made by him was inadequate. As already stated, a cross-objection has been filed by the plaintiff with regard to the awarding of the compensation. The defendant's case was that he constructed a surrounding wall, dug and constructed 4 wells, planted trees and filled up depressions in the ground and constructed a house. The lower Court has allowed to the defendant Rs. 500 for the construction of one well and the surrounding wall and filling up depressions. These things, in our opinion, were necessary for the maintenance and preservation of the property. The compensation awarded to the defendant is not much. We see no reason to interfere with the decision of the lower Court on this point.

It was further contended that the plaintiff had no right of prior purchase as he (defendant) had improved his position by acquiring land in the *Mahal* subsequently. As has been held in *Dharam Singh and others versus Sita Ram and others* decided by His Highness' Board of Judicial Advisers on 17th August 1944, subsequent acquisition of any property does not improve the title of the vendee. There is no force in this contention.

It is, therefore ordered that the appeal and the cross-objection be dismissed with costs.

Appellate Civil

Before Mr. Justice Janki Nath Wazir
and
Mr. Justice Masud Hasan.

AKBAR RATHER AND ANOTHER—(PLAINTIFFS)—
APPELLANTS.

Mst. AZIZI—(DEFENDANT) —
SULTAN RATHER AND OTHERS—(PLAINTIFFS)—
RESPONDENTS.

2002

Mar 23

CIVIL 2ND APPEAL NO. 354 DATED 2001.

(1) Customary Law—When applicable.

It has been laid down quite clearly a number of times that ordinarily parties are governed by their personal law and the only exceptions are those in which one or the other party proves successfully that personal law is abrogated by such customs as are found to be prevailing.

(2) Customary law—Pleading of custom and personal law at one and the same time—Whether correct—Procedure to be followed.

It is noticeable that the pleadings in these parts are drawn up in a light manner and in order to enable the parties to shift their grounds conveniently the current fashion is to say that the parties are governed both by personal law and by custom. This is not a correct way of pleading. This difficulty will be greatly obviated if the Courts confronted with this difficulty make it a rule of almost invariable practice to examine both the plaintiff and the defendant to ascertain from them as to what their position is with regard to custom. Custom has to be directly and definitely pleaded. Parties can be

as long ago as the year 1970 and that the suit was not brought till the year 2000 and it was pleaded that the suit was barred by time in these circumstances. The plea of estoppel arose because of the fact of the mutation to which reference has been made under which the parties had agreed to the mutation of the property in moiety between themselves. The Courts below came to the conclusion that the suit was barred by time. They further held that the plaintiffs were estopped from denying the title of *Mst. Azizi* over the property in suit. The courts below also held unanimously that *Mst. Azizi* was the *Khana Nashin* daughter of Ali and they held by implication that it was custom and not Mohamman Law which obtained between the parties. In these circumstances the plaintiff's suit was dismissed.

Because of the view we have taken of the important issue in this case, *i.e.*, whether *Mst. Azizi* has been successful in proving that she is the *Khana Nashin* daughter of Ali and whether the parties are governed by custom it is not necessary to dwell in detail upon the other issues which have been decided against the appellants. It may, however, be stated that there is no question of the suit being barred by time because in any view of the case the parties were presumed to be co-sharers and as a number of the appellants were minors it was not possible to bring the suit within 12 years after Ali's death. Nor do we think does the question of estoppel arise in this case. We have gone with care over the recitals made in the mutation of the year 1971 and we find that the original statements made by the parties before the Naib-Tehsildar are not extant but a reference to them is made by the Revenue Officer who has passed final orders on the basis of the report made by the Naib-Tehsildar. In this report, it is true, it is stated that the parties have come to a compromise and have agreed that half of the property of Ali be mutated in the name of *Mst. Azizi* and the other half in favour of the plaintiffs because this is the equitable thing to do.' In these circumstances it is not permissible to hold, in our opinion, that the defendant has proved that the plaintiffs are estopped from putting up the claim they have now put up in the course of this suit.

There then remains the question whether the parties are governed by custom and whether *Mst. Azizi* is the *Khana Nashin* daughter of Ali. From a persusal of the judgment of the lower appellate Court it would appear that there still remains in the minds of the lower Courts certain confusion with regard to the question of pleading of custom and personal law. It has been laid down quite clearly a number of times that ordinarily parties are governed by their personal law and the only exceptions are those in which one or the other party proves successfully that personal law is abrogated by such customs as are found to be prevailing in the valley. It is noticeable that the pleadings in these parts are drawn up in a light manner and in order to enable the parties to shift their grounds conveniently the current fashion is to say that the parties are governed both by personal law and by custom. The general form of such pleading is that the parties are "entitled to what they claim. This is not, however, a correct way of pleading. This difficulty will be greatly obviated if the courts confronted with this difficulty make it a rule of almost invariable practice to examine both the plaintiff and the defendant to ascertain from them as to what their position is with regard to custom. We have repeatedly laid down that custom has to be directly and definitely pleaded. It has also been laid down in clear terms that parties can be governed either by personal law or by custom but that it is not possible to countenance any conflicting claims in this behalf. In a Division Bench case recently decided being *Mst. Zebi versus Resha Mir and others*, Civil 2nd Appeal No. 243 of 2001 it was remarked: "Succession could be governed either by a custom or by personal law because there cannot be two different and inconsistent rules of succession or inheritance." In this case it will be found that the pleadings taken by the defendant that the parties are governed by Mohammadan Law and are also governed by custom and that inheritance opens to a *Khana Nashin* daughter are inconsistent. We have, however, one redeeming feature in this case that would resolve confusion as far as this point is concerned. Both the parties led evidence on the assumption that they were governed by custom and it was only on this evidence that the matter of this inheritance

has been approached by both the Courts below. We have stated above that the finding of both the Courts is that *Mst. Azizi* is the *Khana Nashin* daughter of Ali. Learned counsel appearing on behalf of the appellants rather strenuously challenges this finding on the ground, in the first instance, that the oral evidence upon which it is based is not reliable and is insufficient to show that the defendant has been able to prove herself to be the *Khana Nashin* daughter of Ali. It is further contended that there are certain inferences which could be drawn against the position taken by the defendant from the course of mutations which have taken place from time to time with regard to this inheritance after Ali's death. We have already mentioned the matter of the mutation of the year 1971. In the year 1976, will be found in the revenue papers some entries with regard to this family. A clue to this is provided only in the evidence of the *Patwari* namely Damodhar who says that the pedigree of the family was prepared and in that *Mst. Azizi* was not shown as *Khana Nashin* daughter of Ali. Here again the matter is involved both in irregularity and confusion. The material upon which the *Patwari* had deposed has not been retained on the record of this case and we are, therefore, left with no material to judge whether Damodhar was a witness of the truth or otherwise. The position that remains is that we have to rely upon such of the oral evidence as has been led on behalf of both the parties and in this event we are conscious of the limitation that the concurrence of the lower appellate Court with the finding of the trial Court, which had the opportunity of noting the demeanour of witnesses, is a factor not to be easily over-set even though we might agree with the argument advanced on behalf of the appellants that a different view could be taken on the evidence. In these circumstances it will be futile for us to analyse this evidence except to say that on behalf of the defendant there had been produced the *Nambardar* of the village named Gani Khan who is said to be of 62 years of age followed by a team of other veterans more or less approaching that number. On the side of the plaintiffs also there is oral evidence which is in the shape of Khizar But who is 75 years of age and Sidiq Rather and others who are not far behind

As we have stated, the prevailing consideration in our mind is that the finding of fact arrived at in these circumstances is not liable to be over-set. In this view we are of the opinion that *Mst. Azizi* should be held to be the *Khana Nashin* daughter of *Ali*.

It may be noted here that all the plaintiffs are not shown as appellants for reasons into which we need not enter at this stage and the others have been impleaded as respondents, one of whom *Subhan Rather*, respondent No. 2 has filed a cross-objection more or less on the same lines as the case set up by the appellants. Because of the view we have taken we find that there is no force in this cross-objection. Both the appeal and the cross-objection shall stand dismissed but in the circumstances of the case we would leave the parties to bear their own costs.

Revisional Civil

Before the Chief Justice (R. B. Ganga Nath).

SATAR MAKROO—(PLAINTIFF)—APPLICANT.

Versus

RASOOL MEER—(DEFENDANT)—RESPONDENT.

CIVIL REVISION No. 230 OF 2001 (A.R.A.).

2002

Sawan 4.

Negotiable Instruments Act (XXVII- of 1977)—Section 5—Bill of exchange—Requirements of its form—Certainty as to the person who is to act as drawee.

The requirements of form of a bill of exchange are (1) an instrument signed by the maker; (2) an unconditional order; (3) for money only; (4) certainty as to the sum of money; (5) certainty as to the person ordered to pay. Drawee is to be mentioned in such a

manner as there may be left no uncertainty of the person ordered to pay. The mere word 'pay' does not show who is to pay it and consequently there is no certainty as to the person ordered to pay.

A. I. R. 1930 Patna 239 distinguished.

REVISION FROM THE DECISION OF THE SUB-JUDGE ANANTNAG, (PANDIT NAND LAL MATTOO) DATED 14TH Phagan 2001.

MR. A. N. KAK—For the Applicant.

MR. M. S. KAK—For the Respondent.

This is an application in revision by plaintiff against the decree of the lower court dismissing his suit. The plaintiff applicant brought a suit for the recovery of Rs. 756-4-9 on the basis of a document dated 7th Phagan 1998. The defendant contended that the deed in suit was a promissory note and it being not sufficiently stamped was not admissible in evidence. The trial court found in favour of the defendant and dismissed the suit.

The only question for consideration is whether the document on the basis of which the suit has been brought is a promissory note or a bill of exchange. A bill of exchange has been defined in section 5 of the Negotiable Instruments Act, as follows :—

“ A “ Bill of exchange ” is an instrument in writing containing an unconditional order, signed by the maker directing a certain person to pay a certain sum of money only to, or to the order of, a certain person or to the bearer of the instrument.”

The requirements of form under this definition are :—

- (1) an instrument signed by the maker ;
- (2) an unconditional order ;
- (3) money only ;

- (4) certainty as to the sum of money ;
- (5) certainty as to the person ordered to pay ;

In the present deed the 5th requirement is wanting inasmuch as the drawee has not been mentioned. The only word in the deed is "pay." The word "pay" does not show who is to pay it and consequently there is no certainty as to the person ordered to pay. It was contended by learned counsel for the applicant that the drawer and the drawee may be the same person. It may be so but the drawee has got to be mentioned in such a manner as there may be left no uncertainty of the person ordered to pay. He referred to *Bibi Kazmi Begum versus Lashman Lal Sao and others*, 1930 Patna 239 (A. I. R.). It was a case of a *Hundi* which was addressed to a firm and which had been executed by one of its members. In the present case there was no reference to any person who was to act as drawee. The word "pay" means "I shall pay." Otherwise it has no meaning. The document in suit comes under the definition of 'Promissory note' as given in section 4 which is as follows :—

"A 'Promissory Note' is an instrument in writing (not being a bank-note or a currency-note) containing an unconditional undertaking, signed by the maker, to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument."

The promissory note being for Rs. 600 has not been sufficiently stamped because it needed a stamp of annas 2 while it was stamped with a stamp of anna 1. It being so the lower court has rightly held that the document was not admissible in evidence. There is no force in the application. It is dismissed with costs.

Appellate Civil

*Before the Officiating Chief Justice Janki Nath Wazir
and
Mr. Justice Masud Hasan.*

DUKAN GOBIND SAHAI DEWAN CHAND—
(DECREE-HOLDER)—APPELLANT.

Versus

KAHAN CHAND—(JUDGMENT-DEBTOR)—RESPON-
DENT.

2001

Chet, 3.

CIVIL 2ND APPEAL NO. 309 OF 2001.

Limitation Act (IX of 1995)—Articles 181 and 182—Distinction between a fresh application and an application in continuation of the original application.

Under Article 182 successive applications for execution are contemplated as constituting steps-in-aid of execution. They have to be fresh applications to answer this purpose. No such successive applications with a prescribed time limit are contemplated under Article 181.

APPEAL FROM THE DECISION OF THE DISTRICT
JUDGE, MIRPUR (PANDIT BISHAMBER NATH KAUL)
Dated 14th Jeth 2002.

MESSRS. SUNDAR LAL AND ANANT RAM—For the
Appellant.

MR. HIRA LAL—For the Respondent.

Per Masud Hasan J.—This is a second appeal arising out of execution proceedings and is preferred by the decree-holder.

It appears that money-decree was obtained by the decree-holder on 22nd *Phagan* 1987. The first application, for execution was made on the 6th *Har* 1991 and the order consigning it to the record-room was made on 27th *Jeth* 1993. The second application was made on 25th *Jeth* 1996 and this was consigned to the record-room on 30th *Assuj* 1996. Thereafter the application now in dispute was made on 9th *Poh* 2000

and the objection of the judgment-debtor was that it was barred by time both as having been made more than 12 years after the date of the decree as well as more than 3 years from the date of the last application dated 25th *Jeth* 1996.

The first court held that the execution application was not barred by time and in arriving at this finding it took a circumstance into consideration which need only cursorily be reverted to here. It would appear that in the course of these proceedings the judgment-debtor was declared an insolvent. Upon that basis proceedings in the executing court were stayed and the court of first instance was of the opinion that this period should be excluded from the total period and thus treated the present application as one within time. The lower appellate Court came to the conclusion that the application was barred by time on both the grounds stated above.

The main contention of the decree-holder in this case is that the order dated 30th *Assuj* 1996 made on the second application dated 25th *Jeth* 1996 cannot be taken to be a final order which would terminate the execution proceedings before the Court and therefore the present application dated 9th *Poh* 2000 should not be regarded as a fresh application in terms of Article 182 of the Limitation Act but should be regarded as an ancillary application in connection with the second application dated 25th *Jeth* 1996.

It may be stated that the present application was made more than 3 years after the order made on the second application and it has been conceded that if the second application is considered as fresh application, the present application cannot be taken to be within time.

Why the second application must be taken to be still pending is based upon the following grounds :—

“ It is said that a certain item only of the various prayers made in the application was satisfied and the court should have reverted to the other items afterwards and therefore the present application should be taken

to be an ancillary application asking the Court to do so.

We do not agree with this view. The time that has been allowed to be spent by the decree-holder after the order dated 30th *Assuj* 1996 is far too considerable to regard the present application as merely an ancillary application. It would appear that the present application is full-fledged orthodox application quoting the previous application as made last for execution as required by rules. Thus the decree-holder himself did not regard the previous application as one which is still pending but mentioned it as a step-in-aid of execution. Besides, the principles which Mr. Sunder Lal, Learned counsel appearing on behalf of the appellant would have us subscribe to in this matter is the one contained in a ruling of the Allahabad High Court contained in *Rama Kant Malaviya and another versus Satya Narain Malviya*, A.I.R. 1938 Allahabad 552. That was a case of restitution under section 144, C.P.C., and their Lordships held that "the order to send a case to the record-room is merely an administrative order and is not a judicial order. It is in no sense a final disposal of the case. The case therefore has remained pending and no judicial order has been passed on it to terminate it." Although it is true that an order to send the case to the record-room is not a final disposal of the case, the same principle would not apply in the matter of application for execution in execution proceedings. And their Lordships in the above case have themselves been careful enough to draw distinction between these two matters. An application under section 144 C.P.C. falls under Art. 181 whereas that for execution of a decree falls under Article 182 of the Limitation Act. Under the latter Article successive applications for execution are contemplated as constituting steps-in-aid of execution. They have to be fresh applications to answer this purpose. No such successive applications with a prescribed time limit are contemplated under Article 181 and therefore applications in a matter under section 144 are regarded as in continuation of the original application. Herein lies the distinction and it may be given in their Lordships own words "Now, when a case has termi-

nated in a decree, there is the period laid down for successive applications for executions by Article 182, Limitation Act. But it has been held in the Full Bench ruling reported in 1934 A.L.J. 503 that an application under Section 144, Civil P. C., is not an application in execution and is not governed by Article 182, Limitation Act. Accordingly there can be no question of procedure in execution of a decree which will apply in the present case." This ruling is not helpful to the appellant's case. Regarded as a fresh application, it will be found to be beyond time. There is no force in this appeal which shall stand dismissed with costs.

Appellate Civil

Before Mr. Justice Masud Hasan.

ABDUL LATIF AND ANOTHER— (DEFENDANTS)
APPELLANTS.

2001

Phagan 18

Versus

QASIM --- (PLAINTIFF)—RESPONDENT.

CIVIL 2ND APPEAL NO. 386 OF 2001.

Civil Procedure Code (Act X of 1977)—Order XX, rule 14—Decree in pre-emption suit—Omission to mention in the decree that the suit shall be dismissed if purchase money and costs are not paid within the period fixed—Effect.

The sine qua non in a decree for pre-emption is the payment within the prescribed period which is mentioned therein. The direction that the suit shall stand dismissed is implicit in the nature of things because the provision requires that the suit shall be dismissed if the monies are not paid within the prescribed period.

A. I. R. 1924 Lahore 359 ; I.L.R. 14 Allahabad 529 referred to.

Such a direction should be given by the Court that passed the decrees and the executing Court cannot extend

the time of payment because it cannot go behind the decree.

APPEAL FROM THE DECISION OF THE DISTRICT JUDGE MIRPUR (PANDIT BISHAMBER NATH KAUL) DATED 8TH *Katik* 2001.

MR. SURAJ PRAKASH—For the Appellants.

MR. MOHAMMAD IBRAHIM—For the Respondent.

This second appeal arises in the following circumstances :—

A decree for pre-emption was obtained by the respondent in this case on the 30th of *Har* 2000. It related to 6 *kanals* and 13 *marlas* of land. The decree provided payment of Rs. 380 as purchase money plus the costs of registration. This sum was to be deposited within two months of the decree. The pre-emptor decree-holder deposited Rs. 380 in time but failed to deposit the registration costs. On the 21st of *Katik* 2000 an application was made by the defendants in the case before the trial court praying for an order that as the pre-emptor had not paid the full amount he was required to pay under the decree within the prescribed time, the suit should be ordered to be dismissed. The trial Court passed an order in favour of the defendants on their application. The pre-emptor decree-holder appealed and the main objections taken up by him were that the order passed by the Munsiff amounted to an alteration or addition to the judgment which could not be permitted in view of the provisions of Rule 3 of Order 20, C.P.C. It was contended, secondly, that the order was without jurisdiction because it was for the executing court to pass such an order. It was conceded that the costs of registration were not paid. As to this it was argued that the decree was vague inasmuch as it did not specify the costs that were to be paid. These pleas found favour with the lower appellate court which over-set the first court and rejected the application of the defendants. This is now the defendants' appeal from the order.

It will be noticed that in terms of Order 20 Rule 14, C.P.C. the Court passing a decree in a suit for pre-

emption has to make some direction with regard to the payment of purchase money and costs by the successful pre-emptor and that a period has to be prescribed for the payment of these sums. A direction to the effect that if the purchase money and the costs, if any are not paid within the prescribed time the suit shall be dismissed with costs has also to be made. This last direction, it appears, was not made in this case. On the default by the pre-emptor decree-holder of the payment of the costs of registration the application stated above was made by the defendants. I do not find any force in the argument that the order passed by the trial Court is tantamount to an addition or alteration of the judgment delivered by it in the pre-emption case. The provision contained in Rule 3 of Order 20 is with regard to the judgments themselves and not with regard to any orders that may be subsequently passed upon application in connection with these cases. Here the order impeached was passed upon a separate application and the original judgment was in no manner altered or added to. The second contention that the trial court that had passed the decree had no jurisdiction in the matter and that it was for the executing court to pass the order also appears to me to be of the same category. The language used in Rule 14 of Order 20 to the effect that "if the purchase-money and the costs (if any) are not so paid, the suit shall be dismissed with costs" required in my judgment something to be done when a default is made and the order that the suit shall be dismissed can only be given by the court that passed the decree. In any event an application under section 151 C.P.C. would certainly lie to the court that passed the decree. It was suggested on behalf of the respondent that the executing court should have extended the time. That, it could not do because it could not go behind the decree. The only little flaw that appeared was that the direction that the suit shall be dismissed was not contained in the original decree. That omission, however, would not have any effect upon the result of the case because the decree in favour of the pre-emptor decree-holder was for possession of the property on payment of certain sums within the prescribed time and if that condition was not fulfilled the decree-holder could not execute the decree passed by the court. This

view is supported by a ruling of the Lahore High Court reported as *Khan Mohammad versus Ahmed and others*, A. I. R. 1924 Lahore 359. In that case an application urging that the suit should be dismissed was made before the trial court which was granted eventually by the High Court. In an earlier case of the Allahabad High Court, *Jai Kishen versus Bhola Nath and others*, I.L.R. XIV Allahabad 529 a pre-emption decree was passed in which the direction stated above, namely that the suit shall be dismissed' was not made but the period for the payment of purchase money and costs was prescribed. It was held that the decree had become useless because the pre-emptor's "pre-emptive right could only be enforced under the decree if he made the payment within the month, and that if he failed to make the payment within the month the decree which he had obtained was useless to him, as his right was decreed to be dependent on the payment within the month." The *sine qua non* in a decree for pre-emption is the payment within the prescribed period, which is mentioned therein. The direction that the suits shall stand dismissed is implicit in the nature of things because the provision requires that the suit shall be dismissed if the monies are not paid within the prescribed period. I would, therefore, accept this appeal, vacate the order of the lower appellate Court and restore that of the court of first instance. The appellants will have the costs of these proceedings throughout.

Revisional Civil

Before the Chief Justice (R. B. Ganga Nath)
Mr. Justice Janki Nath Wazir

and

Mr. Justice Masud Hasan.

JAGAT RAM—(DEFENDANT)—APPLICANT.

Versus

KHALLA BHAT—(PLAINTIFF)—OPPOSITE
 PARTY.

2002

Sawan 22

CIVIL REVISION No.216 OF 2001.

Agriculturists' Relief Act (I of 1983)—Section 10—Suit for accounts by agriculturist-debtor—Whether a suit by a mortgagor for accounts under section 10 is maintainable.

Held by Full Bench (Wazir J. dissenting) that a suit for accounts by a mortgagor under section 10 of the Agriculturists' Relief Act, 1983, is not maintainable.

REVISION AGAINST THE DECISION OF THE SUBORDINATE JUDGE, BHADARWAH, (PANDIT LASSA KAK)—DATED 23RD Maghar 2001.

MR. DINA NATH—For the Applicant.

MR. INDER DASS—For the Opposite-Party.

Wazir J.—This is a civil revision by the defendant-creditor from a decree for Rs. 179-12-0 dated 23rd Maghar 2001 passed against him by the Subordinate Judge Bhadarwah in a suit for settlement of accounts instituted by the plaintiff-debtor. The plaintiff Khalla Bhat is admittedly an agriculturist as defined in the Agriculturists' Relief Act. He instituted the suit out of which this revision application has arisen, under section 10 of the Agriculturists Relief Act for settlement of accounts on the following allegations —

The plaintiff's father Sikandar Bhat mortgaged 13 *kanals* and 3 *marlas* of land detailed in the plaint with the defendant under a registered mortgage deed dated 26th Jeth 1977 in lieu of Rs. 500. The defendant remained in possession of the mortgaged land for a period of 21 years from the year 1977 upto the year 1997 and appropriated its usufruct to himself. The mortgaged land came into the possession of the plaintiff in the year 1998. The defendant refused to settle accounts of the usufruct received by him from the mortgaged land and to pay the plaintiff the excess money received by him; but on the contrary he instituted a suit for the recovery of the possession of the mortgaged land and obtained a decree for the same. The defendant is entitled to

a maximum amount of Rs. 750, Rs. 500 principal and the rest as interest and as against it he has received profits from the land valuing over Rs. 2,500. The plaintiff prayed for settlement of accounts in terms of section 10 of the Agriculturists' Relief Act and for a decree for the amount that the defendant may be found to have received in excess of Rs. 750 to which he was entitled.

The allegations of facts made in the plaint were not disputed by the defendant in his written statement except in regard to the amount alleged to have been received by him from the usufruct of the land. The defendant's main contentions were that section 10 of the Agriculturists Relief Act did not apply to a suit for accounts on the basis of a mortgage, that under the terms of the mortgage deed no accounting could be claimed by the plaintiff and lastly that the plaintiff could redeem the land only on payment of the principal sum of Rs. 500 secured by the mortgage-deed. The trial court held that the suit as instituted was maintainable that a net profit of Rs. 929-12-0 had been received by the defendant during the period of his possession of the land as against a sum of Rs. 750 to which he was entitled. On these findings a decree for Rs. 179-12-0 was passed against the defendant. The defendant has come up in revision to this court against the above decree.

The sole ground taken in this revision is that the suit for accounts as instituted by the plaintiff was not maintainable under the Agriculturists Relief Act which did not apply to this case. The case came up for hearing before a Single Bench of this Court and it was referred to the Full Bench as the matters that arose for decision were of far-reaching importance and would have a large and wide repercussion. The two questions that call for decision in this case are firstly whether the suit was maintainable under section 10 of the Agriculturists Relief Act and secondly whether because of the fact that the suit shall be tried under the A. R. A. the nature of the transaction itself would be changed and the various agreement between the parties as given in the mortgage deed would be thrown over-board and the

peculiar provisions of the Act would be applicable to the case.

The first question can in my opinion, be easily answered by a reference to the judgment of the Board of Judicial Advisers in *Faqir Chand versus Khem Chand*—2 Jammu and Kashmir Law Reports 158. That was a suit for the recovery of Rs. 17,548 on the basis of a mortgage deed and the question arose whether the suit for the recovery of mortgage money by the mortgagee came within the scope of section 3 of the Agriculturists Relief Act. The High Court held that as there was no covenant in the mortgage deed to pay the mortgage money the suit was not within the scope of the Act. On appeal the Board of Judicial Advisers held that as the suit was for the recovery of money alleged to be due to the plaintiff on account of money lent or advanced to the defendant it surely came within the purview of section 3 of the Act and the fact that it was based upon a mortgage made no difference. According to this authority all suits by the mortgagees for the recovery of mortgage money whether the mortgage contains a personal liability to pay the mortgage money or not, are governed by the provisions of the Act. The question, however, that arises in this case is whether a suit for accounts under section 10 of the Act by a mortgagor who is an agriculturist is maintainable; in other words whether a suit by a mortgagor for accounts comes within the scope of the section. In my opinion there can be but one answer to this question and it is that the suit comes within the scope of section 10 of the Act. The relevant section of the Act may be quoted here with advantage. Section 3 A.R.A. runs as under:—

“Except as may hereinafter be otherwise provided the provisions of this Act apply to—

(a) suits for an account instituted by an agriculturist under the provisions hereinafter contained; and

(b) suits, in which the defendant, or any one of the defendants, is an agriculturist, for

the recovery of money alleged to be due to the plaintiff—

On account of money lent or advanced to, or paid for the defendant, or as the price of goods sold or on an account stated between the plaintiff and the defendant, or

On a written or unwritten engagement for the payment of money not hereinbefore provided for."

The first part of section 10 A.R.A. runs thus:—

"Any agriculturist may sue for an account of money lent or advanced to or paid for him by a creditor, or due by him to the creditor as the price for goods sold, or on a written or unwritten engagement for the payment of money and of money paid by him to the creditor, and for a decree declaring the amount, if any, still payable by or to him to or by the creditor."

The details of the transactions in respect of which a mortgage suit comes under the Act are given in section 3(b) and the transactions in respect of which a suit for account by a mortgagor can lie are given in section 10. An examination of these two sections will show that section 10 is almost a verbatim copy of section 3(b) with only such grammatical variations as are necessitated by the context. Section 3 (b) governs suits for the recovery of money on account of money 'lent or advanced to' or 'paid for' the defendant or as the price of goods sold or on a written or unwritten engagement for the payment of money and section 10 deals with suits by a debtor for an account of money 'lent or advanced to' or 'paid for' him by a creditor or due by him to the creditor as the price of goods sold or on a written or unwritten engagement for the payment of money. The transactions in respect of which a suit for account under section 10 can be brought by a debtor are identical with those in respect of which a suit for the recovery of money may be brought by a creditor under section 3 of the Act. The learned counsel for

the applicant did in the course of his arguments concede that a suit for account at the instance of the mortgagor would lie under section 10 of the Act in all cases of mortgages except only where the mortgage contains covenants mentioned in section 77 of the Transfer of Property Act in which case a suit for account would not be maintainable even though the transaction came within the purview of section 10. Section 77 of the Transfer of Property Act reads as under :—

“ Nothing in section 76 clauses (b), (d), (g) and (h) applies to cases where there is a contract between the mortgagee and the mortgagor that the receipts from the mortgaged property shall, so long as the mortgagee is in possession of the property, be taken in lieu of interest on the principal money, or in lieu of such interest and defined portions of the principal.”

The relevant portion of section 76 is as under :—

“ When during the continuance of the mortgage the mortgagee takes possession of the mortgaged property :—

(b) he must use his best endeavours to collect the rents and profits thereof ;

(g) he must keep clear, full and accurate accounts of all sums received and spent by him as mortgagee and at any time during the continuance of the mortgage, give the mortgagor at his request and cost, true copies of such accounts and of the vouchers by which they are supported.”

The contention of the learned counsel is that a mortgagor of usufructuary mortgage is debarred from bringing a suit for accounts under section 10 of the Agriculturists Relief Act, if in the mortgage deed there is a contract that receipts from the mortgaged property shall so long as the mortgagee is in possession of the mortgaged property, be taken in lieu of interest on the principal money or in lieu of interest and defined portions of the principal. According to him if there is no such contract in the mortgage

deed then a mortgagor of even a usufructuary mortgage is entitled to sue for accounts under section 10. With regard to this contention I would only remark that it is difficult to conceive that the legislature could ever intend such an anomalous result. The Courts have to construe statutes so as to avoid such results. The main argument of the learned counsel in support of this contention is that the Transfer of Property Act and the Agriculturists Relief Act are independent enactments and there is no provision in the latter Act repealing section 77 of the former Act. It is argued that since section 77 of the Transfer of Property Act stands side by side with section 10 of the Agriculturists Relief Act both must be given effect to in such a manner as to avoid a conflict. It is on this reason that the only suit for accounts by a mortgagor that is suggested by the applicant's learned counsel to be excluded from the scope is that where the mortgage contains covenants mentioned in Section 77 T.P.A. and section 10 of the Agriculturists Relief Act. This interpretation has been suggested only to avoid a conflict between the provisions of the two Acts especially because there is nothing in either repealing the provision of the other which may be in conflict. I agree that in such cases the general rule is that every enactment should be construed as far as possible in such a manner as to avoid its coming in conflict with the provisions of every other enactment which it does not in express terms modify or repeal; but when there are clear contradictions in the provisions of the two enactments it may not be possible to reconcile them and give effect to both at the same time. Where the provisions of one enactment are inconsistent with or repugnant to those of another enactment then the general rule of interpretation is that the earlier Act stands impliedly repealed by the later to the extent of inconsistency or repugnancy—*leges posteriores priores contrarias abrogant*.—It is necessary to examine the present case in the light of the above observations. Is there any real inconsistency or conflict between section 10 of the Agriculturists Relief Act and section 77 of the Transfer of Property Act? Section 10 gives the debtor a right to sue for accounts of money lent or advanced to him or paid for him by a creditor and all the money paid by him to the creditor.

Section 77 does not in express terms take away that right. It only provides an exception to section 76 which among other things places the mortgagee under two obligations firstly that he shall use his best endeavours to collect the rents and profits of the mortgaged property and secondly that he shall keep clear, full and accurate accounts of all sums received and spent by him as a mortgagee. The exception provided in section 77 does not deprive the mortgagor of his rights to sue for accounts under section 10 A. R. A. In the case of a mortgage of the kind mentioned in section 77 of the Transfer of Property Act the mortgagee may not be under a legal obligation to keep accounts of the money received and spent by him yet he may be called upon by the mortgagor to settle accounts in a suit coming under the A.R.A. The fact that the mortgage contains a contract mentioned in section 77 Transfer of Property Act will not affect the competence of the court to inquire into and determine the profits earned by the mortgagee from the mortgaged property during the time he was in possession of it. Further there may be a standard for determining the profits accruing from the mortgaged property expressly or impliedly agreed to by the parties to the mortgage and it may be easy to calculate the same by that standard without a reference to the account if any kept by the mortgagee. If that be so and it is invariably so in all usufructuary mortgages of the type mentioned in section 77, the apparent conflict between the provisions of section 10 A.R.A. and section 77 of the Transfer of Property Act disappears altogether. In the present case there is no express covenant of the type mentioned in section 77 of the Transfer of Property Act but such a covenant is implied. It is agreed in the mortgaged deed that the mortgagor will be entitled to redeem the Property at any time by paying the principal sum secured *i.e.*, Rs. 500. This implies that the profits accruing from the mortgaged property will be equal to the interest on the mortgage money to which the mortgager may be entitled. If the rate of interest agreed to between the parties were mentioned in the mortgage deed then the profits would be determined by reference to that rate of interest. In the present case, however the rate of interest agreed to between the parties is not

mentioned in the mortgage deed; but as the Act provides the maximum rate of interest in such cases to be 12 per cent. per annum it may be very rightly be taken that the rate of interest agreed to between the parties in this case was 12 per cent. per annum. In support of this view I may refer to a judgment of a Division Bench of this court delivered as long ago as 1989 in the case of *Phoola versus Ramcharan P.L.R., J. & K.* ruling 398. It was held in that case that where the mortgage was usufructuary and the mortgagee was to be in possession it would be right and equitable to hold that during the time that the mortgagee was in possession of the land the profits were equal to interest at 12 per cent. per annum. In the case before us there is a clear standard for calculating the amount of profits that the mortgagee may be taken to have earned from the mortgaged property during the period he was in possession of it. The total net profits earned by the mortgagee are equal to the amount of interest due on Rs. 500 at 12 per cent. per annum for 21 years and he will be debited with having received that amount without resort to the provisions of clauses (b) and (g) of section 76 of the Transfer of Property Act. In this manner the provisions of section 10 of the A. R. A. will be given effect to without in the least offending against section 77 of the Transfer of Property Act. I am therefore clearly of opinion that there is no inconsistency between section 10, A. R. A. and section 77 of the Transfer of Property Act. If however it be conceded for the sake of argument, as is contended by the applicant's counsel that it is not possible to reconcile the provisions of section 10 of the A. R. A. with those of section 77 of the Transfer of Property Act then which of the two conflicting provisions should be given effect to. In that case the maxim *ages posteriores priores contrarias abrogant* would be followed and section 77 of the Transfer of Property Act would be read subject to section 10 of the A. R. A. The Transfer of Property Act being an earlier enactment and the A. R. A. of 1983 being a later enactment the provisions of section 77 would be impliedly repealed by section 10 of the A. R. A. to the extent of the former's inconsistency with the latter with the result that the latter would be given effect to.

The reasons given hereinbefore are not the only reasons why section 10 of the A. R. A. will be given effect to and not section 77 of the Transfer of Property Act. There is yet another more important reason. The Transfer of Property Act is general Act and the A. R. A. is a special Act *i.e.*, an Act directed towards a special object *viz.*, relieving agricultural classes from indebtedness. The rule of interpretation discussed above that in case of inconsistency between the provisions of two Acts the later Act repeals by implications the former Act, does not apply in the case of inconsistency between a general Act and a special Act. If there is an inconsistency between an earlier special Act and the later general Act the above rule will not apply and effect will not be given to the later general Act. The rule in such cases is that given in the maxim *generalis speciallions non derogant i. e.*, a general later law does not abrogate an earlier special law by mere implication. An earlier special law is not to be held impliedly or indirectly repealed or altered by a later general Act without an express indication of an intention to do so. The legislature will be presumed not to intend to alter the provisions of a special Act by a subsequent general enactment unless that intention be manifested in express language and the general statute will be read as excluding from its operation the cases that have been provided for by the special Act. If the A. R. A. were the earlier Act and the Transfer of Property Act a later Act even then section 77 would not be taken to override or repeal section 10 of the A.R.A. Both because the A. R. A. is a special Act and it is also later Act the provisions of section 10 A. R. A. will in no case be controlled by the provisions of section 77 of the Transfer of Property Act. This will clearly show that section 77 has no bearing whatever on cases under the A. R. A. For the foregoing reasons I hold that the present suit as instituted by the plaintiff mortgagor is clearly maintainable under section 10 of the Agriculturists Relief Act.

I now come to the second question whether in a suit for accounts instituted under section 10 of the A. R. A. by an agriculturist mortgagor the accounting including the determination of the amount due to the mortgagee is to be done according to the provision

of the A. R.A. or according to the terms of the mortgage deed. The answer to this question is, in my opinion, clear. Once a suit comes within the purview of the A. R.A. all proceedings in the suit from the very first to the last must be governed by its provisions notwithstanding any contrary covenant or understanding express or implied between the parties. Sub-section - (2) of section 9 A. R. A. lays down rules according to which accounts are to be taken and those rules have to be followed notwithstanding any agreement between the parties or the persons if any through whom they claim as to allowing compound interest or otherwise determining the manner of taking the accounts. Whether a suit is brought by the mortgagee for the recovery of the mortgage money or is brought by the mortgagor for accounts the mortgagee would not be entitled to get in the total more than the amount allowed under the Act whatever may be the form of the mortgage or its terms as to interest. It was argued by the applicant's counsel that in his view the mortgagee would be in no better position than an unsecured creditor. There appears to be no force in this contention. The mortgagee can get the security enforced by obtaining a final decree for the sale of the mortgaged property if the mortgagor fails to pay the instalments fixed by the court for payment of the mortgage money in the preliminary decree. The remedy is available to the mortgagee whether the suit was one brought by him for recovery of mortgage money or was one brought by the mortgagor for accounts. The instances of special Acts having impliedly abrogated general Acts are not far to seek. To take but one instance reference may be made to the provisions of the Land Alienation Act No. 5 of 1995. It abrogates to a very large extent the Transfer of Property Act where the transferer is a member of an agricultural class and the transferee is not a member of such a class. To illustrate it further reference may be made to the provisions of the Land Alienation Act dealing with mortgages. The provisions of the Transfer of Property Act relating to mortgages are wholly abrogated though impliedly by a few sections of the Land Alienation Act where the mortgagor is a member of an agricultural class and the mortgagee is not a member of an agricultural

class. In such cases the provisions of the Land Alienation Act will be given effect to notwithstanding the various terms of the mortgage deed and the provisions of Transfer of Property Act exactly as would happen in a case under the A. R. A. I am, therefore of the opinion that the provisions of the A. R. A. as to the mode of taking accounts including the determination of the maximum amount to which the mortgagee would be entitled shall apply to the present suit for accounts instituted by the mortgagor. My answer to the questions that arise in this case is that the present suit is maintainable under section 15 of the A. R. A. and that the provisions of the A. R. A. apply to the suit both as regards the taking of accounts and as regards the determination of the amount to which the mortgagee would be entitled.

I am in agreement with the view taken by the trial Court and would therefore dismiss this revision application with costs.

Masud Hasan J.—The points involved in this case relate to the applicability of the Agriculturists' Relief Act. The plaintiff in this suit is an agriculturist. The defendant is not. In the year 1977 the plaintiff's father, Sikandar, mortgaged 13 *kanals* and 3 *marlas* of land described in the plaint for Rs. 500 in favour of the defendant under registered mortgage deed dated 26th *Jeth* 1977. The mortgage was a usufructuary one. Upto the year 1998 the mortgagee remained in possession of this land. In that year, it appears, the plaintiff mortgagor who was occupying the land as a tenant of the mortgagee refused to pay rent and on demand asserted his own proprietorship and denied the mortgagee's title. The mortgagee thereupon preferred a suit for ejectment. This was contested on behalf of the mortgagor and it was alleged that the mortgagee had re-imbursed himself by realising from the produce of land a much larger sum than was due to him and that, therefore, the mortgage stood redeemed. This plea was rejected and the suit was decreed. Thereupon the mortgagor brought the present suit for accounts on the allegation that the defendant mortgagee had

been in possession of the mortgaged land for 21 years and had realised a sum of more than Rs. 2,500 from the proceeds thereof. The relief claimed was that a decree for a sum of money found due to the plaintiff on an account taking in accordance with the provisions of section 10 of the Agriculturists' Relief Act of the produce appropriated by the defendant may be passed in his favour and the mortgaged property may be deemed to have been redeemed.

The defendant mortgagee pleaded, *inter alia*, that the suit was not maintainable under the Agriculturists' Relief Act and it is the matter of the issue arising out of this plea that the case has been referred to the Full Bench. Two points were formulated for this reference, namely (i) whether a suit of this nature would lie under the Agriculturists' Relief Act and (ii) whether in such a suit the account should be taken in accordance with the rules of the Agriculturists' Relief Act, ignoring all the implications of the mortgage.

The trial court has held the suit maintainable under the Agriculturists' Relief Act and has passed a decree in favour of the plaintiff for a sum of Rs. 179-12-0 on an accounting done under the provisions of that Act. The view taken by the trial Court is based entirely upon a ruling of the Board of Judicial Advisers in *Faqir Chand versus Khem Chand*, II J. & K. L. R. 158. That suit was for money by a mortgagee based upon a deed of mortgage. Their Lordships in that case remarked that such a suit was "for recovery of money alleged to be due to the plaintiff on account of money lent or advanced to the defendant, the relief asked for being in the form in which decree can be made under order 34 of the Civil Procedure Code." After examining section 3 of the Agriculturists' Relief Act their Lordships held that "there is nothing in that Act to exclude suits in which claim for money is based upon a deed of mortgage." It will be noticed that they were not considering a suit for accounts by an agriculturist debtor; they were considering a suit for recovery of money due to the plaintiff on account of the money lent or advanced to the agriculturist debtor. Section 3 of the Agri-

culturists' Relief Act may be reproduced here and it is as follows —

“ 3. Except as may hereinafter be otherwise provided, the provisions of this Act apply to—

(a) suits for an account instituted by an agriculturist under the provisions hereinafter contained and

(b) suits, in which the defendant, or any one of the defendants, is an agriculturist, for the recovery of money alleged to be due to the plaintiff

—on account of money lent or advanced to or paid for the defendant, or as the price of goods sold, or

—on an account stated between the plaintiff and the defendant, or

—on a written or unwritten engagement for the payment of money hereinbefore provided for.” Clause (b) of this section obviously does not apply to the present suit because all the suits contemplated in that section require the defendant to be an agriculturist; and the defendant in this case is not an agriculturist. The suit would fall under clause (a) if it could be brought “under the provisions hereinafter contained.” It is argued that that provision is contained in section 10 of the Agriculturist's Relief Act. Section 10 is as follows—

“ 10. Any agriculturist may sue for an account of money lent or advanced to or paid for him by a creditor, or due by him to the creditor as the price for goods sold, or on a written or unwritten engagement for the payment of money and of money paid by him to the creditor, and for a decree declaring the amount, if any, still payable by or to him to or by the creditor.

Before proceeding further the essential difference between section 3 (b) and section 10—a difference

which will distinguish the present case from that decided by the Board—may at once be pointed out. A suit “for the recovery of the money alleged to be due” does not find place in the latter section, for the reason obviously that such a suit has to be for a specific sum and not for accounts which alone is contemplated in section 10. The Agriculturists’ Relief Act of the State is moddled upon the Dekkhan Agriculturists’ Relief Act. That Act itself is far from happily worded and gives rise to a number of defects which create baggling problems. The superimposition made in section 10 of the State Act on the parallel provisions of the Dekkhan Act makes the position even more confused. The suit contemplated in this section is to be by an agriculturist debtor. Assuming the description includes a mortgagor, the suit he can bring is to be for an account of money lent or advanced to———a creditor or due by him to the creditor as the price for goods sold, or on a written or unwritten engagement for the payment of money and of money paid by him to the creditor.” He can only get a declaratory decree naming the amount payable by him to the creditor or payable to him by the creditor. Under section 11 this amount shall be payable in instalments. The question is: Is the present suit for these purposes? The Agriculturists’ Relief Act is a special Act meant for giving relief to a special class of people and for special specified purposes. The provisions of this Act, therefore, have to be applied very strictly to ensure that suits not lying within its scope may not be dragged into it and the Board have conceded that this Act should be strictly construed. Strictly speaking it cannot be said that the present suit is for an account of money lent to the plaintiff mortgagor by the mortgagee; for it is a suit for the account of the produce which has been appropriated by the mortgagee over a number of years under a specific agreement (usufructuary mortgage). There is no question of any account of the money lent. This may be elucidated a little further. The question of an account of money lent or advanced to an agriculturist or paid for him by the creditor arises only in cases where the agriculturist is made liable for balances of transaction in the shape of sums of money advanced to him or paid by the creditor for him

and sums of money paid back by him in satisfaction of such loans. Where there is no such background and the taking of only the neat loan in cash is admitted there is no question of an account of the money so lent. It may well be argued that at the time of the accounting to be done under section 9 "all profits, service or other advantages of every description, received by the creditor in the course of the transactions" have to be credited in the account [Section 9 (2) (c)]. But the appropriation of the produce of the land in suit can hardly be characterised as receipts in the course of the transactions to be set off against the loan. It is rather the consideration in itself under the contract between the parties. The matter of the appropriation of the produce by the mortgagee is a matter of a covenant between the parties which is contained in the deed of mortgage and all that has to be seen is whether it embodies an engagement for the payment of money and of money paid by him to the creditor. The deed of mortgage is very simple document. In it the mortgagor agrees to leave the mortgaged property in possession of the mortgagee who is to appropriate the entire produce of the mortgaged land on payment of the Government revenue. The condition of redemption is the payment of the entire mortgage money in the beginning of any agricultural year, in default of which mortgagor has contracted himself out of the right to regain possession of the property. These conditions may be reproduced verbatim ;

"Kul mablagh panchsad rupaya tamam-o-kamal wasool pakar igrar karta hun keh arazi marhuna beh-gabza murthin rahegi aur murthin beh-adaigi mallya sarkari paidawar arazi morhuna levega..... jab main assal zar rahan beh-maukya shuru sal fassli adai karunga to zamin marhuna fak karalunga badun adai zar rahan sallam gabza zamin ka haq na hoga".

There is here no engagement for the payment of money by the defendant to the plaintiff nor any question of any money paid by the plaintiff to the defendant of which an account could be demanded. And thus the question of a 'decree declaring the amount, if any, still payable by the plaintiff to the creditor (defendant) or by the creditor (defendant)

to the plaintiff' does not arise even if the claim had been for such a decree, which it is not. Considered in its proper perspective the present suit by the mortgagor is in effect, for redemption of the mortgage with a claim for the surplus received by the mortgagee. This would involve consideration of the question whether in the face of the covenants in the deed of mortgage the mortgagee was bound to keep an account under section 76 of the Transfer of Property Act or whether the produce that was to be appropriated by the mortgagee was in lieu of interest and for the consideration of paying Government revenue on behalf of the plaintiff as is mentioned in the deed. These matters, in my opinion, lie wholly outside the economy of the State Agriculturists' Relief Act.

Nor is the assumption that this section is applicable to a mortgagor free from doubt. Section 10 of the State Agriculturists' Relief Act is the same as section 16 of the Dekkhan Agriculturists Relief Act. The only difference is towards the end where in a decree for declaration over and above the sum found payable by the agriculturist debtor to the creditor, the amount payable to the agriculturist debtor by the creditor is also included. In *Shankarapa Dargo patel versus Danapa Virantapa*, I. L. R. 5 Bombay 604, it was held that this section dealt with debts unsecured by mortgage and that it applied only to unsecured monetary transactions of the agriculturists. It is true that it is not always desirable to construe a section of one Act upon another Act passed by a different legislature at a different time. Repelling the argument that Jammu and Kashmir Act having been modelled on the Dekkhan Act would not be taken to include the matter of mortgages which find place in the latter Act but have been deleted in the State Act, their Lordships remarked "It may just as well be that the intention was, by using words wide enough to include mortgage-suits, to avoid provision or references which would be unnecessary or redundant." But this consideration would not hold good in cases where in construing the same provisions, another High Court has taken a different view. It is not prohibited to seek assistance in the matter of interpretation of law from rulings of other

High Courts even though these rulings are not binding. The result of the ruling of the Bombay High Court quoted above was that the legislature there had to add another section, namely section 15 (d) to enable suits for accounts on the basis of mortgages to be brought under the Agriculturists' Relief Act and that section is as follows:—

“Any agriculturist whose property is mortgaged may sue for an account of the amount of principal and interest remaining unpaid on the mortgage and for a decree declaring that amount.”

My answer to the first question, therefore, is that the present suit would not lie under the Agriculturists' Relief Act.

The second question is, more or less, implicit in the first, but on a closer examination it will be found to retain its independent significance.

Para two of section 10 of the Agriculturists' Relief Act lays down that in a suit under that section the amount payable shall be determined under the same rules as would be applicable under the Act if the creditor had sued the agriculturist-debtor for recovery of the debt. These rules are contained in section 9 of the Act. One of the peculiarities, or perhaps the main peculiarity, of the provisions of section 9 of the Agriculturists' Relief Act consists in ignoring certain agreements between the parties regarding certain matters of account. The agreements so contemplated relate “to allowing compound interest or otherwise determining the manner of taking the account,” “statement or settlement of account or any contract purporting to close previous dealings and create a new obligation.” The principle upon which the Agriculturists' Relief Act is based requires the opening of the account between the parties from the commencement of the transaction and take that account according to the rules laid down in it. Where there are no such agreements as are mentioned above and no accounts stretching upon various transactions to be opened from the commencement, the rules for taking account laid down in the Act have no application. As far as the nature of the

present suit is concerned it would not attract the provisions of section 9 quoted above. But the matter does not rest there. There is in section 9 a proviso to the following effect :—

“ Provided further that nothing hereinbefore contained and nothing contained in section 10 shall be deemed to authorise the Court to re-open any agreement contract or account when the account has been finally closed and settled between the parties or the afore-said persons leaving no subsisting liabilities between them.”

In my opinion the covenants of the deed of mortgage will fall within this proviso as the “ contract ” between the parties in this case leaves ‘ no subsisting liabilities between them.’ Under the deed of mortgage the mortgagee was placed in possession of the property with the only express condition that he would appropriate the produce of the land in lieu of paying the Government revenue. The mortgagor was at liberty to redeem the property at any time on paying the full mortgage consideration at the beginning of any Fasli year, without doing which the property was to remain with the mortgagee who was to continue to pay the Government Revenue appertaining to it. This is, therefore, merely a contract falling within the proviso leaving no subsisting liabilities between the parties. In these circumstances my answer to the second question also is in the negative.

I would, therefore, set aside the judgment and decree of the lower Court and direct that the plaint should be returned to the plaintiff to be presented in the court of proper jurisdiction for disposal according to law.

C. J.—I agree.

BY THE COURT.

The application is allowed with costs, the judgment and the decree of the lower Court are set aside and the case is sent back to the lower Court with the direction that the plaint be returned to the plaintiff to be presented in the Court of proper jurisdiction and disposal according to law.

 Appellate Civil

*Before the Chief Justice (R. B. Ganga Nath)
 Mr. Justice Janki Nath Wazir.
 and
 Mr. Justice Masud Hasan.*

AHMED BHAT AND OTHERS—(PLAINTIFFS)—AP-
 PELLANTS.

2002

Versus

GHULAM MOHD. AND OTHERS—(DEFENDANTS)—
 RESPONDENTS.

 Sawan 8

CIVIL IST APPEAL NO. 9 OF 2002.

(I) *Civil Procedure Code (Act X of 1977)—Order XIV rule 5 and Order XLI rule 23—Power of the Court to remand case and direct what issues are to be tried in the case so remanded.*

The plaintiffs came in Court on the basis of a custom under which females take only a limited life interest in the property left by their husbands and claimed the property as reversioners of R on the death of R's widow. They set up a pedigree in their plaint which was not admitted by the defendants who were transferees of R's widow in possession of the property. The defendants contended that succession was governed by Mohammadan Law and not by custom set up by the plaintiffs. They also denied that the plaintiffs were reversioners of R. No issue as to whether the plaintiffs were reversioners of R was framed by the trial Court. The first question to be determined in this case was whether the pedigree set up by the plaintiffs was correct or not because if the plaintiffs were not connected with

R they would have no locus standi and the suit would not proceed. Without going into this question the lower Court found that the parties were not governed by custom but were governed by Mohammadan Law and dismissed the suit. The evidence produced by the plaintiffs themselves was against the custom set up by them. The plaintiffs failed to establish the custom relied on by them. The question that arose on the failure of the plaintiffs to establish the custom set up by them was whether they could get any share in the property in suit under the Mohammadan Law.

Held by Full Bench (Masud Hasan J. dissenting) that the case be sent down to the lower Court for investigation of the claim of the plaintiffs under the Mohammadan Law after framing proper issues.

43 P. L. R. J. & K. Rulings 135 and Civil Second Appeal No. 242 of 2001 referred to.

(Per Masud Hasan J.) The decision of the point whether the plaintiffs were the reversioners or not was not necessary after the Court's finding that the plaintiffs have not been able to establish that the parties were governed by custom. It was no part of the Court's duty to frame an issue whether the plaintiffs would be entitled to anything under the Mohammadan Law. The proposition that it is the duty of the Court to frame issues upon points not taken in pleadings nor arising from any material on the record is one which I find myself wholly unable to subscribe to.

8 Moore's Indian Appeals 170; I.L.R. 6 Allahabad 627; I. L.R. 25 Madras 367; I.L.R. 27 Bombay 485; I.L.R. 27 Allahabad 1; A.I.R. 1919 Madras 698; 38 Indian cases 191; A.I.R. 1926 Bombay 33 referred to.

It is not an uncommon practice for litigants in these parts to shift their grounds as occasion arises. If it is to be laid down as a rule of law that it is the duty of the Courts to explore every conceivable possibility under which a plaintiff may be found to be entitled or a defendant may be found to evade a claim, the position is bound to become very uncertain and of unending difficulty. 43 P. L. R. J. & K. Rulings 135 and Civil

Second Appeal No. 242 of 2001 cannot be made to lend support to the proposition that it was the duty of the Court to frame an issue not arising out of the pleas taken by the parties to discover if the plaintiffs were entitled to anything otherwise.

(2) Civil Procedure Code (Act X of 1977). Order I rule 9—Non-joinder of parties—Difference between necessary and proper parties.

(Per C. J.) There is a distinction between the non-joinder of necessary parties and non-joinder of proper parties. Necessary parties are those in whose absence the Court cannot pass an effective decree at all. Proper parties are those whose presence is necessary in order to enable the Court to completely and adequately adjudicate on all the matters involved in the suit. If the misjoinder is only of proper parties, it can never be itself fatal to the suit.

(3) Civil Procedure Code (Act X of 1977)—Order 14 rule 1—Framing of issues—"Material propositions" explained.

(Per C. J.) Material propositions are those propositions of law or of facts which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence. It is the duty of the Court to ascertain from the plaint, the written statements and the examination of the parties which material propositions of law or fact are on which the right decision of the case appears to depend and upon which of them the parties are at variance and frame issues on them.

(Per Masud Hasan J.) In framing issues care has to be taken that the issues, whether they arise from the allegations in the pleadings or from other materials should not be inconsistent with the pleadings. Nor it is open to the Court to make a fresh case for either party.

(4) Constitution Act (XIV of 1996)—Sections 62 (2) and (63)—Reference to Full Bench—Difference between the two sections.

(Per Masud Hasan J.) Under Section 62 (2) of the Constitution Act, 1996, a case has to be referred to

a Full Bench when there is a difference of opinion among the Judges composing the Bench but under section 63 of the same Act, it is a question of law that has to be referred to a Full Bench and not the whole case.

APPEAL FROM THE DECISION OF THE SUB-JUDGE ANANTNAG (MR. NAND LAL MATTU) DATED 10TH *Chet* 2001.

MR. A. N. RAINA.—For the Appellants.

MR. A. N. KAK.—For the Respondents.

C. J.—The plaintiffs came in Court in this case on the basis of a custom and claimed the property as reversioners of Ramzan. They set up a pedigree in their plaint which was not admitted by the defendants. The defendants contended that succession was governed by Mohammadan Law and not by the custom set up by the plaintiffs. They also denied that the plaintiffs were reversioners of Ramzan. No issue as to whether the plaintiffs were reversioners of Ramzan was framed by the trial Court. One witness produced on behalf of the plaintiffs supported the pedigree but no evidence was given on behalf of the defendants to prove that the pedigree given by the plaintiffs in the plaint was not correct. The defendants were justified in not producing any evidence, because as already stated, no issue in regard to the correctness of the pedigree had been framed by the trial court.

The first question to be determined in this case is whether the pedigree set up by the plaintiffs was correct or not and whether the plaintiffs had any relation with Abdulla, son of Ramzan, because if the plaintiff's were not connected with Abdulla they would have no *locus standi* and the suit would not proceed. Without going into this question the lower court found that the parties were not governed by custom but were governed by Mohammadan Law and dismissed the suit. The evidence produced by the plaintiffs themselves is against the custom set up by them. Their own witnesses have stated that there have been instances of the widows transferring their property. The plaintiffs have failed to establish the custom relied on by them.

The question that arose on the failure of the plaintiffs to establish the custom set up by them was whether they could get any share in the property in suit under the Mohammadan Law. In *Wazir and others versus Alam and others*, 43 P.L.R. J. & K. 135 Division Bench of which none of us was a member decided :—

“ In the absence of any definite proof of custom set up by the parties, they are presumed to be governed in the matter of inheritance by their personal law.”

In a subsequent case, civil second appeal No. 243 of 2001, *Mst. Zebi versus Resha Mir and others*, another Division Bench of which two of us were members held :—

“ It appears that some confusion exists as to whether a person who sets up a custom relating to succession can inherit under the Mohammadan Law. It is only when a custom is set up by a plaintiff which is not admitted by defendant and the plaintiff fails to prove the existence of the custom that the plaintiff would be entitled to succeed under Mohammadan Law because no custom governing succession has been admitted or established by the parties, and in the absence of any custom governing succession it is the personal law which would apply.”

It is thus clear that the plaintiffs are entitled to get a share in the property in dispute under the Mohammadan Law if they were heirs or residuaries of Abdulla.

It was contended on behalf of the respondents that as *Mst. Mukhti* widow of Abdulla was not impleaded the suit should be dismissed. This contention, in my opinion, is without any force. According to the plaintiffs' case on the death of Abdulla the whole of the property which had been mutated in his name on the default of his father *Ramzan* was mutated in the name of his widow

Mst. Mukhti, though under the Mohammadan Law which governed the parties, *Mst. Ashmi*, mother of *Abdulla*, also got a share in it as his mother. On *Mst. Mukhti's* remarriage the entire property was mutated in the name of *Mst. Ashmi*, the mother of *Abdulla*. *Mst. Ashmi* transferred the property in dispute to the defendant respondents and died after the transfer. The property of *Abdulla* which is in dispute is now in possession of the defendant respondents. The plaintiffs' case was that they were residuaries of *Abdulla* and as such were entitled to a share in the property in suit and *Mst. Ashmi's* transfer of their share in it was invalid and ineffective. The plaintiff would be entitled to decree for possession to the extent of their share in the property in suit as residuaries under the Mohammadan Law. No relief has been sought by the plaintiffs against *Mst. Mukhti* or any other heirs or residuaries of *Abdulla* nor is any property in their possession. It was not, therefore, necessary to implead other heirs or residuaries of *Abdulla*. The plaintiffs' cause of action in substance is that *Mst. Ashmi* had no right to alienate their share in the property in suit to the defendant respondents. The plaintiffs would be entitled to joint possession over the property in suit with the defendant respondents.

There is a distinction between the non-joinder of necessary parties and non-joinder of proper parties. Necessary parties are those in whose absence the court cannot pass an effective decree at all. Proper parties are those whose presence is necessary in order to enable the court to completely and adequately adjudicate on all the matters involved in the suit. If the non-joinder is only of proper (as contrasted with necessary) parties it can never be in itself fatal to the suit. In such a case the court can and should under order 1 rule 9 deal with the matters in controversy in so far as the parties actually before the court are concerned and no suit should be defeated by reason of the misjoinder of the parties. It may order the addition of the parties under Order 1 rule 10 sub-rule 2.

As regards the framing of the issue, under Order 14 rule 1 at the first hearing of the suit the Court shall,

after reading the plaint and the written statements if any, and after such examination of the parties as may appear necessary, ascertain upon what material propositions of fact or of law the parties are at variance. Material propositions are those propositions of law or of fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence. It is the duty of the court to ascertain from the plaint, the written statements and the examination of the parties which material propositions of fact or law or on which the right decision of the case appears to depend, and upon which of them the parties are at variance, and frame issues on them.

The question whether the plaintiffs are heirs or residuaries of Abdulla has not been investigated by the lower Court. In my opinion, therefore, it is necessary that the case should be sent down to the trial court for investigation of the claim of the plaintiffs under the Mohammadan Law after framing proper issues and giving the parties an opportunity to produce such evidence as they may wish to.

Wazir J.—I agree and have nothing more to add.

Masud Hassan J.—As this case has been put upon a course different from the one in which it was involved in the concluding stage of its hearing before the Division Bench I would like, first of all to give the circumstances under which the reference was considered necessary. In order to appreciate it properly, however, the facts of the case, in brief, may be stated at the out-set.

This was a suit for possession of agricultural property. The parties are Mohammadans. They belong to village Senzi satroo, Tehsil Pulwama. The plaintiffs' case was that the parties are governed by a custom under which females take only a limited life interest in the property left by their husbands. They alleged that the entire property stood mutated in the name of *Mst. Ashmi*, Ramzan's widow, that females were only entitled to maintenance and had no right to alienate the property. The plaintiffs claimed to be the reversioners of one Ramzan and

laid claim to the entire property left by him basing their cause of action on the death of his widow. Only the transferees of *Mst. Ashmi* in possession of the property were impleaded as defendants. The defendants denied the custom set up by the plaintiffs and pleaded that the parties were governed by Mohammadan Law. The plaintiffs in the forefront of their plaint had given a pedigree in support of their claim to be the reversioners of Ramzan and the defendants denied the correctness of this pedigree. They pleaded that their vendors were absolute owners of the property and had un-restricted right of alienation. They pleaded further that the transfers in their favour were bonafide and for consideration to the knowledge of the plaintiffs who had acquiesced in them all through and were now estopped from challenging them. On these pleadings the more important issue was with regard to the question whether the parties were governed by custom and whether *Mst. Ashmi* had a restricted right of alienation. The suit was decided on this issue and the finding of the Court was that the custom alleged was not established. In this view the court returned no finding on other issues and dismissed the plaintiffs' suit. Before the Division Bench the argument on behalf of the plaintiffs was confined only to assailing the court's finding on the point of custom. When this argument appeared not to find favour the position adopted on behalf of the plaintiffs was that they would be entitled to 'something' under the Mohammadan Law. This position was explored by the Bench but in the fact of the denial by the defendants of the pedigree and in the face of their being no material on the record to show whether the plaintiffs are entitled to the property under the Mohammadan Law and if so to what portion and under what category it was suggested that an issue must go down to the court to explore this position on the ground that it was the duty of the court to find out whether the plaintiffs were heirs according to Mohammadan Law. It was insisted that the trial Court should have recorded a finding whether the plaintiffs were reversioners or not. It is obvious that the decision of the point whether the plaintiffs were the reversioners or not was not necessary after the Courts finding that the plaintiffs have not been able to establish that

the parties were governed by custom. Reversion, it may be stated is an incidence of Hindu Law or custom and not of the Mohammadan Law. The position that was sought to be explored by the Court below was whether the plaintiffs were entitled to anything under the Mohammadan Law, a plea not taken by them. It was conceded that this matter was not broached before the trial even in the course of arguments. Nor does it form part of the very prolix ground of appeal in this court. It was in this way that the question whether it was the duty of the Court to frame an issue with regard to matters which were not pleaded by the parties nor had been adumbrated in the course of the argument before it arose for reference to the Full Bench. It was only upon this limited matter affecting a principle of law that I found it necessary to have the matter referred to the Full Bench.

Subsequently, however the whole case was ordered to be referred to the Full Bench. This order was not brought to my notice and I was not a party to it. Under Section 62 (2) of the Constitution Act, 1996 a case has to be referred to a Full Bench when there is a difference of opinion among the Judges composing the Bench but under section 63 of the same Act it is a question of law that has to be referred to a Full Bench and not the whole case. I understood that action has been taken under section 63 because to my mind there was no point of difference between us except the question cited by me above. We were agreed that the plaintiffs had failed to establish custom as held by the lower Court and on this finding no other point arose in the case. It is, therefore, on this question that I shall address myself.

Issues are framed by Courts exercising original jurisdiction in terms of Order 14, C.P.C. rule 1 of that Order is as follows :—

- " 1. (1) Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other.
- (2) Material propositions are those propositions of law or fact *which a plaintiff must allege*

in order to show a right to sue or a defendant must allege in order to constitute his defence.

- (3) Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue.
- (4) Issues are of two kinds : (a) issues of fact, (b) issues of law.
- (5) At the first hearing of the suit the Court shall, after reading the plaint and the written statements, if any, and after such examination of the parties as may appear necessary,
ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend.
- (6) Nothing in this rule requires the Court to frame and record issues where the defendant at the first hearing of the suit makes no defence."

Under rule 3 of the same order the Court has to frame issues from all or any of the following materials :—

- (a) allegations made on oath by the parties, or by any persons present on their behalf, or made by the pleaders of such parties;
- (b) allegations made in the pleadings or in answers to interrogatories delivered in the suit ;
- (c) the contents of documents produced by either party.

In doing so care has to be taken that the issues, whether they arise from the allegations in the pleadings or from other materials, should not be inconsistent with the pleadings. Nor is it open to the court to make a fresh case for either party. In this case, it will be noted, the plaintiffs' case was based all along

upon custom and upon the fact of their being reversioners of Ramzan. There was, therefore, no occasion for the court, as far as the pleadings of the plaintiffs were concerned except to frame issue whether the parties were governed by custom and the question whether the plaintiffs would be entitled to the property as reversioners was to depend upon the finding on the point of custom in his favour. The fact whether they were or were not the reversioners was implicit in the issue drawn by the Court. To what relief were the plaintiffs entitled after the finding against the plaintiffs on the question of custom this point did not arise and the suit was dismissed. In these circumstances I am of the opinion that it was no part of the court's duty to frame an issue whether the plaintiffs would be entitled to anything under the Mohammadan Law. In saying so I am not unmindful of those cases in which a decree has been passed in favour of the plaintiff of such share as he was found entitled to under the Mohammadan Law on his failure to establish the custom he pleaded. I have myself been a party to many of such decrees but they are all cases in which there existed before the Court material from which relief under the Mohammadan Law could be given and where the relationship of the plaintiff was admitted or at least not denied by the defendant. This is not the position here. Be it as it may, the proposition that it is the duty of the court to frame issues upon points not taken in the pleadings nor arising from any material on the record is one which I find myself wholly unable to subscribe to. A uniform course of rulings from the Privy Council downwards throughout the long course of the administration of justice in this country under the Anglo-Indian Laws support me in this view.

In G. F. Fischer versus Kamala Naiker, 8 Moore's Indian Appeals, 170 the Sudder Dewanany Adawlut at Madras dismissed a suit for specific performance by which the plaintiff claimed the execution of a lease to himself in accordance with an agreement between him and the defendant on the ground that the facts disclosed a case of champerty; a question not raised by the pleadings or in the Court below. In reference to that decision, Their Lordships of the Privy Council remarked, "Their Lordships are

clearly of opinion, that the decree of the Sudder Adawlut in this respect cannot be supported. The grounds on which they arrive at this conclusion make it unnecessary to decide whether, under the law which the Court was administering, those acts which in the English law are denominated either maintenance or Champerty, and are punishable as offences partly by the Common Law and partly by statute, are forbidden and also, if so forbidden, whether the point was in this case so raised by the pleadings, or the points for proof recorded by the Court, that it could be properly entered into. They will observe, however, in passing, that although it may be admitted that the Court would have the right, perhaps even lay under an obligation, to take cognizance, *motu proprio*, of any objection, manifestly apparently on the face of the proceeding, which showed that it was against morality or public policy; yet where, as here, that was only to be collected from the evidence by inference, and was capable of explanation, or answer by counter-evidence, it is highly inconvenient, as well as contrary to the Regulation, XV of 1816, which regulates the practice of the Court, and may lead to the most direct injustice, to enter into the inquiry, if the issue has not been presented by the pleadings, or the points recorded for proof."

In Wali-ullah Khan and another versus Mohammad Israr-ul-lah Khan and others. I.L.R. 6 Allahabad 627, the plaintiffs denounced their signatures on a sale deed as forgeries and never alleged that they had witnessed it under pressure. The Court of first instance found them to be genuine and the lower appellate Court, while agreeing with the court below in its finding upon the question of the genuineness of the signatures, observed that they were obtained under pressure and so reversed the decree of the Court below. On second appeal the High Court held that courts are not to raise important and serious issues in a case for the parties when they have not raised it themselves by their own pleading in the cause. It was observed by Their Lordships; "The issue which the District Judge found in their favour was a very serious issue, and of that class of issues, which in our opinion, the Privy Council has more than once pointed out,

should not be raised by the Judge for the parties when they had not raised it themselves."

In *Venkata Narasimha Naidu and another versus Bhashya karlu Naidu and another*, I.L.R. 25 Madras 367, a Privy Council case also reported in 29 Indian Appeals 76, in a suit for partition against his brother the plaintiff alleged that the immovable family property was joint, and that the defendant had been during the minority of the plaintiff, in possession as manager on behalf of himself and the plaintiff. The defendant stated that the property was by family usage impartible and held by the Senior member of the family and denied that he had held it on behalf of the plaintiff and himself. At the hearing, after the other issues had been settled, the defendant asked to be allowed to raise an issue as to limitation on the ground that he had been in possession adversely to the plaintiff for more than 12 years, the Judge refused to allow the issue to be raised. Their Lordships upheld the action of the Judge and remarked as follows: "Before the issue of impartibility was decided and before any evidence had been recorded, the defendants' vakils applied to raise a general issue that the suit was time-barred, and the District Judge's refusal to raise such an issue had been made a ground of appeal both in the High Court and before their Lordships. But no question of limitation is raised upon the pleadings, and the Judges of the High Court held that although the District Judge had a discretion to raise such an issue, even at the stage of the proceedings at which it was asked for, he was not bound to raise it, and rightly exercised his discretion in refusing to do so. The written statement merely contains a traverse of the allegation that the principal appellant had managed the properties on behalf of himself and the plaintiff. The facts stated in the pleadings as to the appellants' possession were at least consistent with either hypothesis that the *Zamindari* was impartible or that it was partible family property. The character of the possession was dependant on the determination of that issue. In their Lordships' opinion no question of limitation was either raised by the pleadings or arose upon the evidence and it was not obligatory on the Judge to direct an issue."

In *Haji Saboo Sidick and others versus Ayeshabai and another*, I.L.R. 27 (1902) Bombay 485, also a Privy Council case, the suit of the plaintiffs being a Mohammadan widow and a daughter was for possession of estate left by one Haji Haroon Sidick. In the alternative they claimed to be entitled to a share in the estate or in any maintenance out of it. The defendants in their written statement denied that the plaintiffs were the wife and daughter of Haji Haroon Sidick and asserted that another lady was the only widow. Thus the whole of the plaintiffs' claim was denied. After striking the relevant issues on this material the Judge of the High Court in its original jurisdiction held that the first plaintiff was the widow and the second plaintiff the daughter of Haji Haroon Sidick and decreed maintenance in favour of the widow and marriage expenses in favour of the daughter. In the course of his judgment he remarked "I was asked to raise an issue on unchastity. I declined to allow it for three reasons. It was sought to be raised almost at the end of the defendants' case. I should have been obliged to rehear the whole case to enable plaintiff to disprove facts. That would have been an injustice and waste of public time. Evidence has been directed to prove plaintiff was a prostitute. This was only relevant on the question whether the marriage was probable or not. Having held that the issue of unchastity could not be raised, I allowed no evidence to be taken about it." The matter was again raised in appeal before the Privy Council on behalf of the defendants. In dealing with this matter their Lordships after narrating the facts were pleased to remark: "The appellants sought to better their position by applying for leave formally to raise the issue whether, in the event of the plaintiff Ayeshabai being entitled to maintenance from the date of the deceased's death, she has not forfeited such right by unchastity; and on this application being refused, the appellants applied for leave to file a supplemental written statement raising the question of unchastity. Both applications were refused. Both were made after the plaintiff's case was closed. It appears to their Lordships that it was out of the question that, after the plaintiffs' case was closed, this new averment should be made, necessitating as it did the opening

up of the whole case, without any suggestion that the facts relied on had newly come to the knowledge of the appellants and had before been excusably unknown to them.

The proposal that this matter should now be reopened is the more unreasonable as the decree appealed against contains a *dum iusta* clause."

In *Durga Bakhsh Singh versus Mohammad Ali Beg*, I.L.R. (1904) 27 Allahabad 1 (P.C.) there were suits to set aside mortgages on the ground that the mortgagor was of unsound mind at the time of their execution. The plaintiff's witnesses gave evidence which showed insanity of a violent type, but their evidence was not believed by either of the courts below. Held that it was not allowable for the court of first instance to substitute for the case of insanity advanced by the plaintiff a case of weakness of mind and consequent helplessness, when the type of insanity connoted in the evidence was something quite different, and on that ground to give the plaintiff partial relief.

In *Nagappa and others versus Siddalingappa and others*, A.I.R. 1919 Madras 698 the suit was to recover a certain sum of money under a mortgage-deed against the defendants who were minors and who were represented in the suit by their guardian. In appeal on behalf of the minors it was contended that there was no proof as to the proper execution of the mortgage and its attestation according to law. No issue was raised upon this point before the court below. In these circumstances the contention was repelled and it was remarked: "The issues that were raised relate to question of limitation and *res judicata* and those were the points apparently argued at the trial. We think that we should be perfectly justified in this case in saying that any question as to the execution of the document was waived at the time of the framing of issues and the trial of the suit." In that case also it was contended that it was the duty of the court itself to decide this question, but their Lordships were of the opinion "The proposition however as to the duty of the court to raise proper issues is laid down in broad terms. But we do not think it was intended to lay down that upon ques-

tion of fact it is the duty of the court, even though the party in whose interest it is to raise necessary issues, does not choose to do so to frame such issues of its own motion. Any general proposition of that character would in our opinion be subversive of proper conduct of cases and we are unable to assume that the learned Judge of the Bombay High Court intended to lay down any such rule. On the other hand we agree with the ruling of this court reported as *Ponnusamu Pillai versus Posopathi Mudliar* (2) where it is laid down that an omission to raise an issue on a question of fact implies an abandonment of that question by the party interested. No doubt where the question is one purely of law, such as limitation or jurisdiction it is incumbent on the Court to frame proper issues on such of questions but it would not be safe to extend any such rule to issues of fact. We, therefore overrule this objection raised by the appellant's pleader."

In *Jhari Singh and others versus Babu Pirthi Nath Sahu and others* (1917) 38 Indian Cases 191 a Bench of the Patna High Court refused to countenance the proceeding of the trial Court in raising additional issues not taken in the pleadings by way of converting the plaintiffs' claim on the basis of a contract of tenancy whereas it was based on the basis of unlawful possession. Their Lordships were pleased to remark "It is very hard to understand upon what principle either of the two lower courts acted. No application to amend the plaint was put forward by the plaintiffs; nor did the defendants themselves ask for any alternative relief, which would have warranted the court in raising or framing any additional issues which might have determined the question which the Court decided." In this case the court considered a number of cases in which the same view was taken.

In *Dodbasappa Dharamappa versus Pradhanappa Venkappa and others*, A. I. R. 1926 Bombay 33 in considering the extend and scope of order 14 Rule 5, C. P. C. permitting the court to frame additional issues a Bench of the Bombay High Court held that a court has under rule 5 power to frame additional issues. But the additional issues authorised by this rule are

such as may be necessary for determining the matter in controversy between the parties and that is a clear indication that it was not the intention of the legislature that the Judge should travel outside the actual averments and counter-averments of the parties. Fawcett J. in his judgment remarked "My learned brother had already referred to the remarks on this point in *Naro Hari versus Anburanabai* (2) and I may further draw attention to the observation in that judgment that what is to be considered is the case made by a party and not the case as moulded by the astuteness of the Judge."

It will be noticed that the observations quoted from the cases mentioned above apply with even greater force to the facts of the present case.

It is not an uncommon practice for litigants in these parts to shift their ground as occasion arises. Scarcely, if at all, an attempt is made to think out the position in terms of fact or the law applicable to them. In cases of inheritance it is not unusual to find parties arguing that they are entitled under Shafai Law if their claims fall under the Hanafia or Shia Law. The prevalence of certain customs in the valley makes the position even more intriguing. A custom is appropriated or discarded according as the exigency of the hour dictates. Incidence of custom in the shape of *Pisar Parwarda*, *Dukhtar Khana Nashin* and *Khana Damad* etc., etc., are alleged or denied as it suits the occasion. In this state of things it is difficult enough for courts to keep the parties pinned down to their pleadings. If it is to be laid down as a rule of law that it is the duty of the courts to explore every conceivable possibility under which plaintiff may be found to be entitled or a defendant may be found to evade a claim the position is found to become very uncertain and of unending difficulty. What is really argued in this case is that whereas the plaintiffs' case was that they were entitled to relief by pleading certain facts it was the duty of the court itself to conceive a series of other probable facts which if pleaded may entitle the plaintiffs to some relief if their case on their own pleadings failed. I am, therefore, of the opinion that the answer to the

abstract proposition of law whether it is the duty of a court to frame an issue on material not before it by way of pleadings or otherwise is in the negative.

Strictly speaking I am required to address myself to this question only as far as the reference to the Full Bench is concerned.

As, however, the whole case has been referred to the Full Bench and I have had the advantage of reading the judgment of His Lordship the Chief Justice and have the misfortune again to disagree with the order proposed by him I would like to say a few words in this behalf. I may be permitted to say with great respect that I am in complete agreement with the propositions of law in the abstract laid down in the judgment of His Lordship. Under the Sri Partap Jammu and Kashmir Laws Consolidation Act, 1977, Mohammadan Law in cases where the parties are Mohammadans governs matters of inheritance unless it is abrogated by custom. On the failure of a party to establish custom if the plaintiff is found to be entitled to a share by way of inheritance under the Mohammadan Law he is entitled to get a decree.

It will be noted, however, that the position now confronting us did not appear in the two cases cited, in the Judgment by His Lordship. Both these cases did not require to be sent back to the trial court to explore if the plaintiff would be found to have a claim to inheritance under the Mohammadan Law. In both these cases the relationship of the parties was admitted and in both of them the question whether the parties would be entitled under the Mohammadan Law was taken up before the trial Court. In the 43 P.L.R., J. & K. case both the parties pleaded custom, the one appertaining to the power of alienation of ancestral property by a sonless proprietor and the other setting up a custom of unrestricted alienation by such a proprietor as also the custom of inheritance by a *Khana Damad*. The trial court held that none of these customs was established and granted relief to the plaintiffs under the Mohammadan Law. In this case the pedigree was admitted and there was no doubt about the

category under which the plaintiffs were entitled to inherit. The lower appellate court upset the finding of the trial court but the High Court restored it. In Civil second appeal No. 242 of 2001, *Mst. Zebi versus Resha Mir and others*, the claim was on behalf of a Mohammadan daughter who said that being a *Khana Nashin* daughter she was entitled to the entire property left by her father. The defendants contended that the plaintiff was not a *Khana Nashin* daughter but admitted that the parties were governed by custom under which daughters inherited only if they were *Khana Nashin* and not otherwise. The plaintiff remained unable to prove that she was a *Khana Nashin* daughter and her suit was, therefore dismissed in spite of the fact that the position was shifted on her behalf and it was contended that in that event she must be given a share under Mohammadan Law. The ratio of the case is that custom was established as having been admitted by both the parties and therefore the plaintiff could get nothing under the Mohammadan Law. These cases, therefore, cannot be made to lend support to the proposition now advanced, i.e., that it was the duty of the court to frame an issue not arising out of the pleas taken by the parties to discover if the plaintiff's were entitled to 'anything otherwise. His Lordship the Chief Justice is pleased to remark "The plaintiffs' case was that they were residuaries of Abdulla and as such were entitled to a share in the property in suit....." With great respect I would venture to point out that this was at no time the plaintiffs' case and that there would have been no difficulty for the lower Court to consider the proposition if it had been so.

There are to my mind many and serious impediments in the way of sending the case back now to investigate whether the plaintiffs are heirs and residuaries of Abdulla and whether they are entitled to inheritance under the Mohammadan Law. Firstly, it will be changing the entire cause of action. The plaintiffs claimed as reversioners of Ramzan. The investigation now sought will be whether they are residuary heirs of Abdulla. Secondly, Ramzan died considerably more than 12 years ago and the whole property had been mutated eventually in the name of

his widow *Mst. Ashmi*. This would entail an investigation of the nature of possession in the hands of *Mst. Ashmi* and may possibly give rise to the question of adverse possession. Thirdly, the property is now in the hands of the transferees of *Mst. Ashmi* (by mortgages and sales) and this would give rise to the investigation of the question whether they are *bona fide* transferees for value and without notice. Fourthly, a question might arise whether by omitting to seek relief under the Mohammadan Law the plaintiffs' case would come within the mischief of Order 2, Rule 2, C.P.C. It will, therefore, be seen that the question is not only of the investigation of the relationship of the plaintiffs with Abdulla. Countenancing this contention at this stage will amount to entirely changing the whole case and would be tantamount to making altogether a new case with a considerable enlarged scope based totally upon a different cause of action for the defendants to meet. On these facts, the plaintiffs will not be found entitled to seek even an amendment of the plaint rather than contending successfully that it was the duty of the court to explore if they had a claim under the Mohammadan Law. In these circumstances I find myself unable to agree with the order proposed. I would accept the findings of the lower Court that the plaintiffs have failed to establish the custom set up by them and I would dismiss this appeal with costs.

BY THE COURT.

It is ordered that the appeal be allowed with costs, the decree of the lower Court be set aside and the case be sent down to it for investigation of the claim of the plaintiffs under the Mohammadan Law after framing proper issues and giving the parties an opportunity to produce such evidence as they may wish to. The costs of the trial court will abide the result.

Appellate Civil

Before Mr. Justice Janki Nath Wazir.

and

Mr. Justice Masud Hasan.

2002

Baisakhi 18.

JAMAL DIN—(DEFENDANT)—APPELLANT.

Versus

GOPAL SINGH AND OTHERS—(PLAINTIFFS)—RESPONDENTS.

CIVIL 2ND APPEALS NOS. 237 & 238 OF 2001.

Right of Prior Purchase Act (II of 1993)—Section 20—Suit to enforce right of prior purchase to be brought when sale completed i. e., after the sale deed is registered.

Section 20 lays down that any person entitled to a right of prior purchase may when the sale or foreclosure has been completed, bring a suit to enforce that right. Under Section 138 of the Transfer of Property Act read with section 61 of the Registration Act the sale is completed when the sale deed is registered. A suit for the exercise of the right of prior purchase can be brought by the plaintiff pre-emptor only after the sale is completed, i. e., after the sale deed is registered.

42 P.L.R. J. & K. Rulings 280 followed.

APPEALS FROM THE DECISION OF THE DISTRICT JUDGE, JAMMU (PANDIT RAM NATH SHARMA) DATED 18TH Chet 2000.

MR. RAM LAL ANAND—For the Appellant.

MESSRS. CHAMAN LAL AND DINA NATH—For the Respondents.

Per Masud Hasan J.—These are two connected second appeals and arise out of two suits instituted by the plaintiffs pre-emptors to pre-empt two sales which had taken place in the year 1985. The sale

S. N. D.A.R., J.A.L.C.
VALDI HIGH COURT,
SRINAGAR (Kashmir)

deeds were registered on 22nd *Magh* 1997 and the suits to pre-empt the sales were brought on 19th *Magh* 1998. The vendee defendant resisted the suits on various grounds and one of them was that the suits were barred by limitation. The trial Court of Subordinate Judge Jammu holding that the suits were within time decreed the plaintiffs' suit. On appeal the learned District Judge affirmed the decrees of the trial Court and dismissed the vendee defendant's appeals. The vendee has filed two separate appeals and this order shall dispose of both these appeals.

The sole question for determination in these appeals is whether the suits brought by the plaintiffs pre-emptors are barred by time or not. It is argued on behalf of the appellant that as the sale deeds were executed in the *Samvat* year 1985 time will run from the date of the execution of the sale deeds and not from the date of registration. This contention is without force. The Right of Prior Purchase Act came into force in 1993 and in section 11 of that Act it is specifically provided that in respect of all sales and foreclosures, not completed before the commencement of this Act, the right of prior purchase shall be determined by the provisions of this Act. Section 20 of the Right of Prior Purchase Act lays down that any person entitled to a right of prior purchase may, when the sale or foreclosure has been completed, bring a suit to enforce that right. The question for determination is when the sales were completed. Under section 138 of the Transfer of Property Act read with section 61 of the Registration Act the sale is completed when the sale deed is registered. A suit for the exercise of the right of prior purchase can be brought by the plaintiff pre-emptor only after the sale is completed, *i. e.*, after the sale deed is registered. A similar view was taken by a Division Bench of this Court in a case reported as *Dewan versus Taj Mohd. and others*, 42 P. L. R. J. & K. 280. In the present case the sales were completed on 22nd *Magh* 1997 and the suits were brought within one year from that date. The suits have been rightly held to be within time. There is no force in these appeals and they are dismissed with costs.

Appellate Civil

*Before the Chief Justice (R. B. Ganga Nath)
and
Mr. Justice Masud Hasan.*

2002

SADHO AND ANOTHER (DECREE-HOLDERS)—AP-
PELLANTS.

Baisakh 20.

Versus
BHIMOON AND ANOTHER—(JUDGMENT-DEBTORS)—
RESPONDENTS.

CIVIL 2ND APPEAL NO. 426 OF 2001.

*Limitation Act (IX of 1995)—Article 181—Article
applicable when decree cannot be executed without
fulfilment of a condition.*

*Where in terms of the decree the right of the decree-
holder to recover possession of property is contingent
upon his paying certain sum of money to the judgment-
debtor but no date for payment is specified, the decree-
holder is entitled to pay the money on the date when the
decree was passed and to ask for possession immediately
after the payment had been made. The right to recover
possession accrues to the decree-holder immediately and
at once and he is not entitled to prolong the date of
payment by his action or laches.*

A. I. R. 1931 Allahabad 326 referred to.

APPEAL FROM THE DECISION OF THE DISTRICT
JUDGE, JAMMU (PANDIT RAM NATH SHARMA) DATED
18TH Maghar 2001.

MR. DINA NATH—For the Appellants.
MR. CHAMAN LAL—For the Respondents.

Per G. J.—This is the decree-holder's appeal
arising out of execution proceedings. He obtained a
decree for possession of property on payment of a

certain sum of money. He did not apply for execution of the decree for ten years. After ten years he deposited the money and asked for possession. The execution Court without issuing notice to the representatives of the deceased judgment-debtor put the decree-holder in possession. The judgment-debtors took an objection and applied for restitution of possession. They also contended that the decree on the face of it was time-barred. The execution Court held that the decree was time-barred and put the judgment-debtors back in possession. The decree-holder went up in appeal and the lower Court upheld the decision of the execution Court. He has now come here in second appeal.

The only point for consideration is whether the decree in execution was time-barred or not. As already stated the decree-holder was entitled to put the decree in execution and obtain possession on payment of a certain sum of money which was deposited by him after ten years. There is no doubt that when there is a condition in the decree to be fulfilled and without whose fulfilment the decree cannot be executed Article 181 of the Limitation Act applies. So Article 181 applies to the present case. The question is when the time for execution would start and when the right to apply accrued. Where in terms of the decree the right of the decree-holder to recover possession of property is contingent upon his paying certain sum of money to the judgment-debtor but no date for payment is specified, the decree-holder is entitled to pay the money on the date when the decree was passed and to ask for possession immediately after the payment had been made. The right to recover possession accrues to the decree-holder immediately and at once and he is not entitled to prolong the date of payment by his action or laches. This view is supported by a ruling of the Allahabad High Court reported in *(Sri) Narain Tawari and another versus Brij Narain Rai and another* A. I. R. 1031 Allahabad 326. We agree with the decision of the lower Court and find that the execution application was time-barred. The appeal is dismissed with costs.

Appellate Civil.

Before the Officiating Chief Justice (Janaki Nath Wazir).

and

Mr. Justice Masud Hasan.

RUSLA—(DEFENDANT)—APPELLANT.

Versus

SHER MOHAMED—(PLAINTIFF)
GULLA AND OTHERS—(DEFENDANTS) } RESPONDENTS.

2001

Phagan 26

CIVIL 2ND APPEAL NO. 298 OF 2001.

Mohammadan Law—Legitimacy—Acknowledgment—Scope of doctrine—Presumption from marriage.

No statement made by one man that another (proved to be illegitimate) is his son can make that other legitimate, but where no proof of that kind has been given such a statement or acknowledgment is substantive evidence that the person so acknowledged is the legitimate son of the person who makes the statement, provided his legitimacy is possible. 43 I. A. 212.

In all cases in which marriage may be presumed from co-habitation combined with other circumstances for the purpose of conferring upon the woman the status of a wife, it may also be presumed for the purpose of establishing paternity.

APPEAL FROM THE DECISION OF THE DISTRICT JUDGE, JAMMU (PANDIT HIRANAND RAINA) DATED 6TH Bhādon 2001.

MR. JANAK LAL—FOR THE APPELLANT.

MR. HAMID ULIAH KHAN—FOR THE RESPONDENTS.

Per Officiating C. J.—This is defendant's second appeal and arises out of a suit instituted by the plaintiff Sher Mohd. for joint possession of 30 *kanals* and 17 *marlas* of land situate in Bhadarwah. The plaintiffs' case was that he is the son of Rustam Dar and is entitled to this property. The defendant resisted the suit on the ground that the plaintiff is not a legitimate son of Rustam Dar, that *Mst. Rupi*

the mother of the plaintiff had eloped with Rustam Dar and nothing was heard about them, that Rustam Dar died without any male issue. The trial Court of Subordinate Judge Bhadarwah found that the plaintiff is an illegitimate son of Rustam Dar and dismissed his suit. On appeal the District Judge came to the conclusion that the plaintiff is a legitimate son of Rustam Dar and is entitled to the joint possession of property described in the plaint. The plaintiff's suit was therefore decreed. Against this decree the defendant has come up in further appeal.

It has been argued on behalf of the appellant that the lower appellate Court has not taken into consideration the evidence produced by the defendant, that the lower Court has held that the plaintiff is legitimate son only on the acknowledgment made in the presence of certain witnesses by the deceased father of the plaintiff and that acknowledgment would not give him the status of a legitimate son of Rustam Dar and that the plaintiff's suit has been wrongly decreed.

The only question for determination in this case is whether the plaintiff is a legitimate son of Rustam Dar or not. In order to prove this fact the plaintiff has produced two witnesses Abdulla and Man Chand. Abdulla has stated that a son was born to Rustam Dar. He attended the feast which was given by Rustam Dar at the birth of that son. This witness has further stated that the plaintiff was a small boy when he went to his father's house. Man Chand, another witness produced on behalf of the plaintiff, has stated that he used to go to the house of Rustam Dar very often and once he saw some children playing in the compound and enquired from him as to whose children they were. The reply given by Rustam Dar was that these children were his and the plaintiff was among those children.

Mst. Rupi, the mother of the plaintiff has appeared on behalf of the plaintiff and from her statement it appears that she was married to Rustam Dar before they proceeded to Chamba. Her marriage was performed in village Chhangru before a certain *Nikah-k'han*. She has named *Nikahkhan* but that *Nikahkhan* has not been produced.

Moreover there is a mutation No. 68 produced by the plaintiff by which land was mutated in favour of *Mst. Rupi* after the death of *Rustam Dar*. In these mutation proceedings *Rusla* has made a statement in which he has mentioned that *Mst. Rupi*, daughter of *Mohamada*, went with *Rustam Dar* and lived as his wife with him at *Chamba*. As she has not remarried therefore he has no objection if the mutation of the land left by *Rustam Dar* is made in her favour. *Desa* an attesting witness of this mutation has been produced who stated that *Rusla* admitted *Mst. Rupi* to be the widow of *Rustam* deceased. From the evidence of *Abdulla* and *Man Chand* it is abundantly clear that *Rustam Dar* acknowledged the plaintiff as his son. *Mst. Rupi's* statement shows that she was a lawfully wedded wife of *Rustam Dar* and the plaintiff was their son.

Counsel for the appellant has argued that mere acknowledgment on the part of *Rustam Dar* is not sufficient to give the plaintiff the status of a legitimate child and entitle him to inherit the property left by his father. In support of this contention reliance is placed upon section 249 of *Mulla's Mohamaden Law* in which it has been mentioned that the acknowledgment must be not merely of sonship but must be made in such a way that it shows that the acknowledgment meant to accept the other not only as his son, but as his legitimate son." It has been argued that as the acknowledger *i.e.*, *Rustam Dar* accepted the plaintiff as his son and not as his legitimate son therefore the plaintiff is not entitled to inherit the property of his father. It may be mentioned here that the defendant has not produced any satisfactory evidence to show that the plaintiff was an illegitimate son of his father. Some of the defendants had in their written statement definitely stated that they did not know who the plaintiff was but subsequently they have stated that the plaintiff is not a legitimate son of *Rustam Dar*. They have produced one *Ramzan* to establish the plea of illegitimacy but his evidence is of no avail to the defendants. *Ramzan* stated that one *Suba* brought the plaintiff to him and asked him to teach him the art of sawing wood. In order to show that the plaintiff was the son of *Suba* the defendant ought to have produced *Suba* but he has

not been produced and the evidence of Ramzan is by no means convincing. As pointed out above the plaintiff has produced evidence to show that he was acknowledged by his father as his son. *Mst. Rupi* his mother, has deposed that she was lawfully married to Rustam Dar, father of the plaintiff, In *Sadik Hasain Vs. Hashim Ali*, 42 Indian Appeals 212 it was laid down by Their Lordships of the Privy Council :—

“No statement made by one man that another (proved to be illegitimate) is his son can make that other legitimate, but where no proof of that kind has been given such a statement or acknowledgment is substantive evidence that the person so acknowledged is the legitimate son of the person who makes the statement provided his legitimacy is possible.”

In Wilson's Mohammadan Law section 84 on page 164 para 84 it has been laid down :—

“In all cases in which marriage may be presumed from co-habitation combined with other circumstances, for the purpose of conferring upon the woman the status of a wife, it may also be presumed for the purpose of establishing paternity.”

In the present case the defendants have not been able to establish that the plaintiff is an illegitimate son of Rustam Dar. The plaintiff has been able to show that his father acknowledged him to be his son. This acknowledgment therefore, in the absence of any proof that the plaintiff is an illegitimate son, would be deemed to be sufficient proof of the fact that the plaintiff is a legitimate son of his father Rustam Dar deceased and thus entitled to inherit his property. The lower appellant Court has, therefore, rightly decreed the plaintiff's suit. There is no force in the appeal which is dismissed with costs.

Revisional Civil

Before the Chief Justice (R. B. Ganga Nath)

MANGAL SINGH—(PLAINTIFF)—APPLICANT.

Versus

PUNJAB SINGH AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

2002

CIVIL REVISION NO. 170 OF 2001.

Baisakh 18

*Court Fees Act (VII of 1977)—Section 7 (v) (d)—
Suit for possession of land forming part of an estate
but not separately assessed.*

*When the suit is for the land which forms part of
an estate paying revenue to the State and is not a
definite share of such an estate and is not separately
assessed, court fee is to be paid under clause (v) (d) of
section 7 of the Court Fees Act, 1977.*

A. I. R. 1933 Allahabad 414 referred to.

REVISION FROM THE DECISION OF THE SENIOR
SUB-JUDGE, JAMMU (PANDIT HIRANAND RAINA)
DATED 1ST *Chet* 2001.

MR. CHAMAN LAL ADVOCATE—For the Applicant.
MR. DINA NATH ADVOCATE—For the Respondents.

This is an application in revision against the order of the lower Court holding that the court-fees should be paid *ad valorem* on the market value of the land, under section 7, clause 5(d) of the Court-fees Act. The plaintiff brought a suit for the possession of 1944 *kanals* and 8 *marlas* of land in *Khewat* No. 1/1, 2, and 3. The plaintiff's case was that he was in possession over 76 *kanals* 11 *marlas* out of his one-fourth share in these three *Khewats*, for which he did not seek possession. The plaintiff sought to pay the court-fees under clause 5 (b). The question is whether the case comes under clause 'b' or under clause 'd'. The clause 'b' is as under:—

“Where the land forms an entire estate, or a definite share of an estate, paying annual revenue to Government, or forms part of

such estate and is recorded as aforesaid ; eight times the revenue so payable.”

and the clause ‘ d ’ is :—

“ Where the land forms part of an estate paying revenue to government, but is not a definite share of such estate and is not separately assessed the market-value of the land ; ”

The case clearly comes under clause ‘ d ’ because the suit is for the land which forms part of an estate paying revenue to the State and is not a definite share of such an estate and is not separately assessed. This view is fully supported by A.I.R. 1933 Allahabad, 414. The decision of the lower Court is correct. There is no force in this application. It is dismissed with costs.

Appellate Civil

2001

Before the Officiating Chief Justice (Janki Nath Wazir)
and

Chet 3.

Mr. Justice Masud Hasan.

RAMOON SHAH—(DEFENDANT)—APPELLANT.

Versus

SHIV RAM AND OTHERS--(PLAINTIFFS)--RESPONDENTS
JAGAN NATH AND OTHERS—(DEFENDANTS).

CIVIL 2ND APPEAL NO. 51 OF 2001.

*Land Revenue Act (XII of 1996)—Section 31—
Presumption in favour of revenue entries rebuttable.*

It is but common place that entries in the revenue records are made for fiscal purposes ; they are not by themselves conclusive evidence of title. The presumption of genuineness attachable to them under the law is rebuttable.

APPEAL FROM THE DECISION OF THE SENIOR
SUBORDINATE JUDGE, JAMMU (PANDIT HIRANAND
RAINA) DATED 6TH Phagan 2000.

MESSRS. HARBANS BHAGAT, BANSILAL—For the Appellants.

MESSRS. MADSUDHAN KAK AND RUP CHAND NANDA—For the Respondents.

Per Masud Hasan J.—This second appeal arises out of a suit for redemption and is the defendant's appeal. The redemption relates to 1 *Kanal* and 18 *marlas* of land situate in *Khasra* No. 22 in *Mauza* Hansari, Tehsil Reasi.

The plaintiff's case is that in the year 1960 they mortgaged this plot of land with the defendant for Rs. III-8-0, that he has been in possession since and that they want to redeem the property. The defendant controverted these allegations and pleaded that what was said to be a mortgage was really a transaction of sale and that he had been in possession of the land as proprietor ever since the year 1960. He further said alternatively that he had been in continuous possession of the property and had acquired title by means of adverse possession.

The trial Court regarded the transactions of the year 1960 as that of a mortgage and granted a decree for redemption on payment of Rs. III-8-0 in favour of the plaintiffs. With this finding the lower appellate Court agreed and hence the defendant's appeal.

The document dated 29th *Phagan* 1960 in favour of the defendant's father executed by the plaintiffs' ancestors is on the record. There is no doubt and indeed there is no controversy before us that this document is anything but a deed of sale. The difficulty arises on the score of various mutations which took place on the basis of this transaction. It may be stated here that the document is not a registered one and according to the Law of Registration it could not be taken into consideration as a document conferring any title upon the parties. It is not quite clear when for the first time mutation took place on the basis of this document. But it appears from the papers on the record that in the year 1964, to be precise on 29th *Maghar* 1964, a report was made by the *Patwari* that a wrong mutation had

been effected on the basis of a certain document which was not registered. The proceeding so initiated — we do not know the reason why it was initiated after 4 years—culminating in an order of the Tehsildar dated 26th *Magh* 1965 wherein it was said that the parties were examined and on behalf of the defendants, Ramoon Shah appeared and he stated that originally a sale transaction had taken place between the parties but it was cancelled and that he had received back his money and therefore the entries should be reverted placing the ancestors of the plaintiffs as proprietors and those of the defendants as tenants under them. This entry was again changed by an order dated 1st *Chet* 1965 when the parties again presented themselves before the Tehsildar and the ancestors of the defendant insisted that a sale had taken place and the entries should be mutated accordingly. Then again Ramoon Shah appeared and said that if Dulo ancestor of the plaintiff wanted to be entered as a mortgagor, an entry may be made accordingly. It was in these circumstances that an entry of mortgage with regard to this transaction was made in the year 1965. The entry has been continuing since. There is, however, no manner of doubt and this is not a matter which has been contested before us that the defendant has been in possession of this plot of land continuously and that the entries show that he has not been paying anything by way of rent to anybody excepting the land revenue to the Government. In these circumstances and with this state of the revenue record it is contended on behalf of the plaintiffs that a mortgage should be presumed and the suit for redemption should be decreed. The plaintiffs lay the foundation of their arguments on the entries made in the year 1965. If we had not known the circumstances in which these entries were made it was perhaps open to the plaintiffs to argue that a presumption of genuineness should be attached to them. But in the face of the circumstances narrated above, this argument is without force. Besides there is extant before us the document whereby the original transaction took place. It is but common place that entries in the revenue records are made for fiscal purposes; they are not by themselves conclusive evidence of title. The presumption of genuineness attachable to them

under the law is rebuttable. It is conceded that if the document of 29th *Phagan* 1960 has not been vitiated by the defect of being unregistered there would have been no doubt that the transaction would be considered to be one of sale. It is further conceded that although the sale deed cannot be used for the determination of any matter for which it is statutorily barred yet it can be used for the purpose of gauging the nature of the possession starting under it. Judged from that point of view two things will appear to be quite clear; one that the entries in the revenue papers have been made carelessly upon such airy and casual statements as have been made from time to time before the Revenue authorities with regard to this matter and secondly, that the defendants' possession started in terms of and after the execution of the sale deed of 1960. These facts point to two clear conclusions; one that the presumption of genuineness attaching to revenue entries stands rebutted in this case and that the nature of the defendant's possession was not that of a mortgagee but that of a proprietor. In this view we are of the opinion that the findings arrived at by the Courts below on the basis of mere mutation entries were not justified. The plaintiffs have remained unable to prove that a legally operative mortgage subsisted and that they are entitled to redeem the property in dispute.

The plaintiffs suit must, therefore, fail. The judgment and decree of the lower Court are accordingly set aside. This appeal is allowed with costs.

Revenue Reference.

FULL BENCH.

*Before the Chief Justice (R. B. Ganga Nath).
Mr. Justice Janki Nath Wazir.
Mr. Justice Masud Hasan.*

2002

Baisakh 11

VAKIL CHAND AND OTHERS—PETITIONERS.
Versus
DEEN DAYAL AND OTHERS—OPPOSITE PARTY.

LAKHPAT—PETITIONER.

Versus

TEJU—OPPOSITE PARTY.

REVENUE REFERENCES NOS. 1 AND 2 OF 2001.

Tenancy Act (II of 1980)—Section 95 (1) (b)—Power of High Court to validate proceedings under mistake as to jurisdiction—Who can make reference to High Court—What is "Revenue Court."

Held by Full Bench that a Revenue Officer is a Revenue Court if he exercises jurisdiction only with respect to any such suit as is described in sub-section (3) of section 85 of the Tenancy Act. It is not every revenue case in which or every revenue Court which can make a reference to the High Court under section 95. The scope of section 95 is limited to only those cases which come under sub-section (3) of Section 85.

REFERENCES MADE BY THE COLLECTOR JAMMU, (MR. M. A. SHAHMIRI) DATED 16TH NOVEMBER 1944.

MR. CHAMAN LAL—For the applicants.

MESSRS. BALINDAR SINGH AND BANSI LAL SURI—For the non-applicants.

Per C. J.—Reference No 2 of 2001 may be disposed of with this case as the same point of law arises in both the cases. These cases have been referred to this Court by the learned Collector under section 95 sub-section (1) (b) which lays down :—

"If it appears to a Revenue Court that a Court under its control has determined, a suit which should have been heard by a civil Court,

the civil Court or revenue Court, as the case may be, shall submit the record of the suit to the High Court of Judicature."

"Revenue Court" has been defined in section 85 sub-section (1) of the Tenancy Act as follows :—

"When a Revenue Officer is exercising jurisdiction with respect to any such suit as is described in sub-section (3) of this section

or with respect to an appeal or other proceeding arising out of any such suit, he shall be called a Revenue Court.

The suits to be tried by the Revenue Courts are described in sub-section (3) of section 85 of the Tenancy Act. A Revenue Officer is a Revenue Court if he exercises jurisdiction only with respect to any such suit as is described in sub-section (3) of section 85 of the Tenancy Act. It is conceded as well as it is clear that the present case does not come within the list of suits described in sub-section (3) of section 85. Therefore the Revenue Officer dealing with the present case was not a Revenue Court. It is not every revenue case in which or every revenue Court which can make a reference to this Court under section 95. The scope of section 95 is limited to only those cases which come under sub-section (3) of section 85. The case under reference, therefore, is not one in which a reference could have been made by the learned Collector to this Court under section 95. It is, therefore, ordered that the case be returned to the learned Collector for disposal in accordance with law.

A copy of this order shall be placed on the file of Reference No. 2 of 2001.

Revisional Civil

Before the Chief Justice (R. B. Ganga Nath).

SUNDAR—(JUDGMENT-DEBTOR)—APPLICANT.

Versus

RAM CHAND AND OTHERS—(DECREE-HOLDERS)—*Eaisakh* 18
OPPOSITE PARTY.

2002

CIVIL REVISION NO. 204 OF 2001.

Limitation Act (IX of 1995)—Articles 181 and 182 (7)—Instalment decree—Time from which period of limitation begins to run.

Article 181 applies to the enforcement of the default clause. If execution application is not made within 3 years from the date of default, the decree-holders's remedy for the enforcement of the default clause becomes time-barred. As regards the execution for the instalments

which are within time article 182 (7) will apply and there is no reason why execution cannot be allowed for them.

A. I. R. 1935 Allahabad 259 and A. I. R. 1936 Bombay 268 referred to.

REVISION FROM THE DECISION OF MUNSIFF JAMMU, (MR. MOHAMAD MUZAFAR KHAN) DATED 26TH *Assuj* 2001.

MR. DINA NATH—For the Applicant.

MR. H. L. WAZIR.—For the Respondents.

This is an application in revision by the judgment-debtor. The opposite party obtained instalment decree which provided that in case of default of payment of two instalments the entire sum would be recoverable at once. The decree was for instalment of Rs. 4 per harvest. The decree-holder took out the execution of the decree passed in 1992. The decree-holder made the present execution application on 25th *Jeth* 2001 and claimed the entire sum which remained due on the allegation that he had received 11 previous instalments upto *Maghar* 1997. The applicant contended that he had paid nothing to the decree-holder. The lower Court has held that the execution application is within time and has allowed execution for the entire sum that remained due.

The question is whether the execution application is wholly time-barred or whether the execution for those instalments which fell due within three years of the execution application is within time. Article 181 of the Limitation Act would apply to the enforcement of the default clause. As the execution application was not made within 3 years from the date of default, the decree-holder's remedy for the enforcement of the default clause became time-barred. As regards the execution for the instalments which are within time Article 182 clause 7 would apply and there is no reason why execution should not be allowed for them. This view is supported by A. I. R. 1935 Allahabad page 259 and A. I. R. 1936 Bombay page 268. It is, therefore, ordered that this revision application be partly allowed and the order of the lower Court be modified to this extent that the

execution would be allowed for only those instalments which fell due within 3 years of the execution application. The parties shall get and pay costs in both Courts in proportion to their success and failure.

Revisional Civil

Before the Chief Justice (R. B. Ganga Nath).

2002

REVENUE COMMISSIONER—APPLICANT.

Baisakh 18

Versus

NOOR ELLAHI AND OTHERS—OPPOSITE PARTY.

CIVIL REVISION NO. 165 OF 2001.

Alienation of Land Act (V of 1995)—Section 6—List of Agricultural classes—"Kashmiri" a class by itself.

"Kashmiri" is a class by itself as found in the list of agricultural classes vide schedule which relates to the Jammu Province.

REVISION FROM THE DECISION OF THE DISTRICT JUDGE, MIRPUR (PT. BISHAMBAR NATH KAUL) DATED 11TH Magh 2001.

MR. DINA NATH—For the Applicant.

MESSRS. CHAMAN LAL AND HAMID ULLAH—For the Opposite Party.

This is an application in revision against the order of the lower Court rejecting the application made by the applicant under section 26 of the Land Alienation Act. The opposite party obtained a decree for the specific performance of contract of sale. The application was based on the ground that the decree was against the provisions of the Land Alienation Act in as much as the vendee in whose favour the decree had been passed by the trial Court was not a member of an agricultural class. The lower Court found that the opposite party was a member of an agricultural class.

The only question for determination is whether the opposite party (vendee) belonged to an agricultural class or not. He has been recorded in the

Revenue papers as "Kashmiri." It has been contended on his behalf that his ancestors migrated from Kashmir and therefore he was recorded as Kashmiri but as he was a Bhatti Rajput by caste he belonged to an agricultural class. "Kashmiri" is a class by itself as we find in the list of the agricultural classes. Under the schedule which relates to the Jammu Province, in Kathua at No. 9, Kashmiri Musalmans other than Khoujas have been mentioned as one of the agricultural classes; in Reasi, Kashmiris other than Khoujas and in Udhampur, Kashmiri Musalmans other than Khoujas are described as members of agricultural classes. So it is wrong to say that the term "Kashmiri" has been used to show that the tribe migrated from Kashmir. On the other hand "Kashmiri" refers to a class. Where the Kashmiri Musalmans are treated as members of agricultural class they are specifically so mentioned. This case comes from Mirpur and in the list of agricultural class of Mirpur there is no mention of any Kashmiri as a member of agricultural class. The opposite party may be a Bhatti Rajput but he is a Kashmiri which is a class by itself and is not included in the list of agricultural classes. He would not be deemed to be a member of an agricultural class for the purpose of Land Alienation Act. No explanation has been given as to why he and his ancestors were always recorded as Kashmiri in the Revenue papers. The opposite party does not come under the definition of agricultural class and, therefore, is not entitled to acquire land under the Land Alienation Act.

The reason why Kashmiris were not classed as members of an agricultural class in certain districts in the Jammu Province was obvious. They having migrated from another province were treated as outsiders in these districts and it was not, thought desirable that they should be permitted to purchase land. In other districts where they were included in the list of agricultural classes they were not treated as outsiders, perhaps because their ancestors had settled down for a very long time and had made agriculture their main occupation. It is, therefore, ordered that the application be allowed, the order of the lower Court and the decree of the trial Court be set aside. The applicant will get his costs in both Courts.

Appellate Civil.

Before Mr. Justice J. N. Wazir.

MUNICIPAL COMMITTEE, JAMMU—(DEFENDANT)
APPELLANT.

2002
Baisakh 14

Versus

K. S. MIAN NASIR-UD-DIN AHMED—(PLAINTIFF)—
RESPONDENT.

CIVIL 2ND APPEAL NO. 454 OF 2001.

Nuisance—Permanent nuisance—Injunction to Municipality to restrain from keeping filth depot near plaintiff's house—Defence that cannot be pleaded.

It is now settled law that it is no defence that the plaintiff came to the nuisance knowingly. It is no defence that the nuisance, although injurious to the individual plaintiff is beneficial to the public at large, nor is it any defence that the place from which the nuisance proceeds is a suitable one for the purposes of conveying on the operation complained of, and that no other place is available in which less mischief would result.

APPEAL AGAINST THE DECREE OF SUB-JUDGE
JAMMU (LALA BRIJNANDAN LAL) DATED 21ST Poh
2001.

MR. DINA NATH—For the Appellant.

MR. CHAMAN LAL—For the Respondent.

This is defendant's second appeal and arises out of a suit instituted by the plaintiff for an injunction to restrain the defendant from keeping a filth depot near the plaintiff's house. The defendant resisted the suit on the ground that the filth Depot was in existence long before the house of the plaintiff was constructed and that it does not cause any discomfort to the plaintiff. The suit of the plaintiff has been decreed by the Court of the first instance and on appeal the

the decree was maintained by the Subordinate Judge, Jammu and hence this second appeal.

The facts found are that the plaintiff has constructed a house about 5 or 6 years ago and that the filth depot was in existence at the time the construction was started. The learned counsel for the defendant appellant argued that the Courts below were wrong in ordering the defendant to remove the filth depot to some other place. It has been further argued that the filth depot is not a nuisance and, therefore the plaintiff's suit could not be decreed. Lastly it was urged that the trial Court which heard this case has not struck a definite issue whether the existence of this filth depot was a permanent nuisance or not. It may be stated here that the plaintiff has definitely alleged in his plaint that the existence of the filth depot is a source of great discomfort to him and the other neighbours. The plaintiff has alleged that filthy smell is discharged by the refuse collected by the Municipality near his house which is a source of discomfort and causes illness to his family members. The trial Court has struck the following issue:—

“ Whether the filth depot is situate near the house of the plaintiff and whether it causes any discomfort to the plaintiff.”

After examining the evidence produced by the parties the trial Court came to the conclusion that the filth depot is situate very near the house of the plaintiff and is a source of great nuisance to him. Although there is no issue on the point whether the filth depot is a permanent nuisance or not yet the plaintiff has adduced evidence to show that this filth depot where the refuse of the city is deposited emits very filthy smell and is a source of great discomfort to him. Even the witnesses of the defendant have stated that filthy smell is discharged by the refuse collected at the depot. It has been stated by some witnesses of the defendant that the bad smell comes not from the filth depot alone but from the *Nallah* also which is passing near the plaintiff's house. This is not the case of the plaintiff that bad smell is discharged by the *Nallah* and not by the refuse collected at the depot but the simple question to

be determined in this case is whether this filth depot is a source of permanent nuisance or not. The parties adduced evidence although there was no definite issue struck by the trial Court on this particular point. It was the duty of the defendant to draw the attention of the Court to strike a definite issue on this point for the determination of the suit. As pointed out above there is sufficient evidence led in this case to determine whether the filth depot near the house of the plaintiff is a source of great discomfort to the plaintiff or not. From the evidence of the witnesses produced by the plaintiff it is clear that it is a permanent nuisance and a source of great discomfort to him. It has been argued that the plaintiff had himself built the house without the permission of the Municipality and that he could construct the house somewhere else when he knew the existence of the filth depot nearby. It is now settled law that it is no defence that the plaintiff came to the nuisance knowingly. It is no defence that the nuisance, although injurious to the individual plaintiff, is beneficial to the public at large, nor is it any defence that the place from which the nuisance proceeds is a suitable one for the purposes of carrying on the operation complained of, and that no other place is available in which less mischief would result. It has been argued that the trial Court ought not to have passed a decree directing the defendant to remove the filth depot to some other place. In my opinion the decree passed is quite correct. If it is proved that keeping of a filth depot is a permanent nuisance and causes discomfort and inconvenience to the owners of a neighbouring house the only relief which the Court could grant is to restrain the defendant from using the place as a filth depot. It is no defence on the part of the defendant to say that by reasonable care he could prevent the causing of nuisance. Both the Courts have unanimously held that the filth depot near the house of the plaintiff is a nuisance of permanent nature and in these circumstances the plaintiff's suit has been rightly decreed. This appeal is, therefore, dismissed with costs.

Appellate Revenue.

Before Mr. Justice J. N. Wazir.

MOHAR SINGH AND ANOTHER—(PLAINTIFFS)—APPELLANT.

Versus

THE JUDICIAL MINISTER—(DEFENDANT)—RESPONDENT.

2002

Baisakh 14

REVENUE 2ND APPEAL NO. 13 OF 2001.

Land Revenue Act (XII of 1996)—Section 47—Assessment once fixed to remain in force till new assessment takes effect—Remedy open under section 52 (1) (e).

A person is entitled to the refund of any part of the land revenue which he has already paid according to the rates determined at the time of general assessment even if the assessment of such land revenue requires revision in consequence of the action of water etc. The only remedy open to such a person is to apply for special assessment under section 52 (1) (e).

APPEAL AGAINST THE DECISION OF THE GOVERNOR OF JAMMU (MR. M. A. SHAHMIRI), DATED 17TH *Katik* 2001.

MR. R. L. ANAND—For the Appellants.

MR. DINA NATH—For the Respondents.

This is plaintiff's second appeal and arises out of a suit instituted by him for the refund of Rs. 1,218 on account of land revenue paid by him. The plaintiff's case was that a part of land measuring 664 *kanals* 5 *marlas* which was assessed at *abi parta* should not be so assessed as the irrigation channel which used to irrigate this land had ceased to irrigate for the last 14 years. The plaintiff's suit was dismissed by the Wazir Wazarat, Jammu on the ground that the suit was not tenable. On appeal the learned Collector affirmed the decree of the trial Court and

dismissed the plaintiff's appeal and hence this second appeal.

The only question for determination in this case is whether the plaintiff could claim the refund of the revenue which has been paid by him to the State. The plaintiff claimed the refund on the ground that the irrigation channel had ceased to function for the last 14 years and, therefore, the State was not entitled to recover revenue which had already been recovered and that the plaintiff is entitled to the refund of Rs. 1,218. A reference to section 42 and 43 of the Land Revenue Act will show that the rate of the land revenue of a particular plot of land, is fixed at the time of general assessment and when that rate is sanctioned by the Government then this rate is announced in the village. If any person is aggrieved he can put in an application for reconsideration of the amount as is provided under section 45 of the Land Revenue Act. Under section 46 of the Land Revenue Act an assessment which has been confirmed by the Government becomes final and under section 47 of the Act it is provided that the assessment once fixed shall remain in force till new assessment takes effect. From these provisions in the Land Revenue Act it is clear that the plaintiff appellant cannot claim the refund of the land revenue. The only remedy open to the appellants is to apply for special assessment under section 52, sub-section (1) clause (e) of the Land Revenue Act which provides "special assessment may be made by an Assistant Collector 1st class in the following case :—

" when the assessment of land revenue requires revision in consequence of the action of water or sand or any calamity or from any other cause."

The plaintiff, therefore, is not entitled to the refund of any part of the land revenue which he has already paid according to the rates determined at the time of general assessment. The Courts below have rightly dismissed the plaintiff's suit. There is no ground to interfere with the order of the lower appellate Court. This appeal fails and is dismissed with costs.